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Supreme Court, U.S.
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**In The
Supreme Court of the United States**

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CARLYLE FORTTRAN TRUST,

Petitioner,

VS.

NVIDIA CORPORATION, et al.,

Respondents.

♦

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

♦

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In 1972, the United States Supreme Court held in *Caplin v. Marine Midland Grace Trust Co. of New York*, 406 U.S. 416, 428 (1972), that a bankruptcy trustee lacks standing to sue third parties on behalf of a class of creditors. Since *Caplin*, there has been a **"divergence among the circuits"** concerning the ability of a bankruptcy trustee to bring actions against third parties on behalf of creditors of the bankrupt." *E.F. Hutton & Co. v. Hadley*, 901 F.2d 979, 987 (11th Cir. 1996). See also *Koch Refining v. Farmers Union Cent. Exchg., Inc.*, 831 F.2d 1339, 1349 (7th Cir. 1987) ("Two recent appellate opinions . . . have decided this issue of a trustee's standing in **diametrically opposite ways.**"); *In re Miller*, 197 B.R. 810, 814 (W.D.N.C. 1996) ("These **two lines of cases** raise a question that was not asked, and therefore was not answered, in *Caplin*.").

1. Was the Ninth Circuit correct in rejecting the "line of cases" published by the Second, Eighth and Eleventh Circuits which held that a creditor has standing to assert general creditor claims under *Caplin*?

The Second Circuit has adopted the *Wagoner* rule, which provides that, "A claim against a third party for defrauding a corporation with the cooperation of management accrues to creditors, not to the guilty corporation." *Shearson Lehman Hutton, Inc. v. Wagoner*, 944 F.2d 114, 118 (2nd Cir. 1991). The Ninth Circuit, in the unpublished opinion below, held that

QUESTIONS PRESENTED – Continued

“the *Wagoner* rule has been much criticized and we decline to follow it.” Pet. App. 7 (citing *In re Senior Cottages of Am., LLC*, 482 F.3d 997, 1003-04 (8th Cir. 2007)).

2. Was the Ninth Circuit correct in declining to follow the Second Circuit’s *Wagoner* rule?

3. As between a Chapter 11 reorganization trustee and a creditor of the estate, does the creditor (landlord) have standing to pursue interference claims against a third party for causing the debtor in bankruptcy (tenant) to breach the lease?

As between a Chapter 11 reorganization trustee and a creditor, does the creditor (landlord) have standing to pursue claims against a third party for lease damages in excess of the 11 U.S.C. § 502(b)(6) “cap”?

4. If a purchase and sale agreement provides that the buyer is purchasing certain assets listed in an exhibit to the agreement, is the buyer’s signature on the agreement alone sufficient to satisfy the statute of frauds (rather than requiring the buyer to sign the exhibit as well)?

Does an E-mail from the buyer admitting that the buyer “bought” those assets satisfy the statute of frauds?

PARTIES TO THE PROCEEDING

Petitioner is Carlyle Fortran Trust.

Respondents are nVidia Corporation, nVidia US Investment Company, f/k/a Titan Acquisition Corp. No. 2, Jen-Hsun Huang, James C. Gaither, A. Brooke Seawell, William J. Miller, Tench Coxe, Mark A. Stevens, Harvey C. Jones, Stephen H. Pettigrew, Christine B. Hoberg, Richard A. Heddleson, Gordon A. Campbell, James Whims, James L. Hopkins, Scott D. Sellers, and Alex M. Leupp.

CarrAmerica Realty Corporation, CarrAmerica Realty, LP, Carr Office Park, LLC, and Carr Texas OP, L.P. (collectively, "CarrAmerica Parties") are appellants in the appeal (Ninth Circuit Docket No. 06-17109) that was consolidated with the appeal filed by petitioner Carlyle Fortran Trust (Ninth Circuit Docket No. 07-15077). Petitioner Carlyle Fortran Trust has been informed that the CarrAmerica Parties are not joining in this Petition or filing their own Petition.

CORPORATE DISCLOSURE STATEMENT

The parent company of Carlyle Fortran Trust is Carlyle Fortran Holdings, L.L.C. No publicly held company owns 10% or more of the ownership interests of any of the above referenced entities.

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OPINIONS BELOW

The opinion of the Ninth Circuit Court of Appeals ("Ninth Circuit") was unreported and is reprinted at Pet. App. 8. The order of the Ninth Circuit amending the opinion and denying the petition for rehearing *en banc* is reprinted at Pet. App. 35-37. The order of the United States District Court for the Northern District of California was unreported and is reprinted at Pet. App. 9-34.

STATEMENT OF JURISDICTION

The opinion of the Ninth Circuit was issued on November 25, 2008. Pet. App. 1. A timely petition for rehearing *en banc* was denied on January 22, 2009. Pet. App. 37. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of 11 U.S.C. § 502(b), 11 U.S.C. § 524(a) and (e), Cal. Civ. Code § 1624, Cal. Civ. Code § 1633.4, Cal. Civ. Code § 1633.7, and Cal. Civ. Code § 1633.9 are reprinted in Pet. App. 38-44.

STATEMENT OF THE CASE

I. INTRODUCTION

The underlying appeal is from an order dismissing the complaint of petitioner Carlyle Fortran Trust ("Carlyle") under Rule 12(b)(6) of the Federal Rules of Civil Procedure for lack of standing. First and foremost, the issue in this appeal is whether a creditor or a trustee in bankruptcy has standing to assert "general" creditor claims against third parties. This issue raises a complex question of bankruptcy law that has engendered irreconcilable inter-circuit conflicts ever since *Caplin v. Marine Midland Grace Trust Co. of New York*, 406 U.S. 416 (1972) – conflicts that have been well documented and recognized in numerous published opinions and treatises. See e.g., *E.F. Hutton & Co. v. Hadley*, 901 F.2d 979, 987 (11th Cir. 1996) ("We recognize that there has been **divergence among the circuits** concerning the ability of a bankruptcy trustee to bring actions against third parties on behalf of creditors of the bankrupt."); *St. Paul Fire and Marine Ins. Co. v. PepsiCo, Inc.*, 884 F.2d 688, 696 (2d Cir. 1989) ("The courts that have considered this issue, however, have reached **differing conclusions.**"); *Koch Refining v. Farmers Union Cent. Exchg., Inc.*, 831 F.2d 1339, 1349 (7th Cir. 1987) ("Two recent appellate opinions (released since the writing of the above *Koch* opinion but prior to its publication) have decided this issue of a trustee's standing in **diametrically opposite ways.**"); *In re Miller*, 197 B.R. 810, 814 (W.D.N.C. 1996) ("These **two lines of cases** raise a question that was not

asked, and therefore was not answered, in *Caplin.*"); Richard J. Corbi, *Causes of Action: What Is and Is Not Part of the Bankruptcy Estate?*, 17 NORTON J. BANKR. L. & PRAC. 4 (2008) ("There are **divergent views** as to how the courts answer this question.").

Second, this appeal also presents an irreconcilable inter-circuit conflict with respect to the application of the *Wagoner* rule. *Shearson Lehman Hutton, Inc. v. Wagoner*, 944 F.2d 114, 118 (2nd Cir. 1991) ("A claim against a third party for defrauding a corporation with the cooperation of management accrues to creditors, not to the guilty corporation.").

Third, this appeal concerns the issue of who has standing – the creditor (landlord) or reorganization trustee for the debtor (tenant) – to seek damages in excess of the bankruptcy cap ("cap") against an interfering third party who caused the debtor (tenant) to breach its lease with the creditor (landlord).

Finally, this appeal presents the question whether the statute frauds can be satisfied through E-mails. The opinion of the Ninth Circuit (which answered this question in the negative) is clearly contrary to California statutes and case law.

Carlyle respectfully petitions for writ of certiorari for a review of the opinion of the Ninth Circuit so that profound and "diametrically opposite" inter-circuit conflicts concerning important issues of bankruptcy law finally may be resolved.

II. FACTS

A. The nVidia Agreement

The underlying lawsuit arises out of a highly unusual agreement, labeled an "asset purchase" agreement, between 3dfx Interactive, Inc., the debtor ("3dfx"), and respondent nVidia Corporation ("nVidia"), a publicly traded corporation, pursuant to which nVidia acquired substantially all of 3dfx's assets for a combination of cash and nVidia stock. Subject to a certain exception, the "asset purchase" agreement between 3dfx and nVidia provided that while the cash was available to 3dfx to satisfy the obligations owed to its creditors, the nVidia stock could be distributed only to 3dfx's shareholders and not the creditors.

Carlyle is the owner and landlord of an office building in San Jose, California. 3dfx was a public company which developed and sold graphics chips out of the office building that 3dfx leased from Carlyle.

3dfx and nVidia were competitors. In December 2000, 3dfx (which was then insolvent), nVidia, and respondent nVidia US Investment Company ("nVidia Sub"), entered into an "asset purchase" agreement ("nVidia Agreement") whereby (a) nVidia agreed to purchase substantially all of 3dfx assets for an immediate payment of \$70,000,000 cash and a contingent payment of 1,000,000 shares of nVidia common stock (then worth more than \$50,000,000), which could be transferred only to 3dfx's insiders, and (b) 3dfx agreed to (i) cease operations, (ii) discharge over \$119,000,000 in liabilities of 3dfx and its subsidiary,

STB Systems, Inc., **with only the \$70,000,000 cash**, and (iii) wind up its business and dissolve.

nVidia knew that the wind up and dissolution of 3dfx constituted an event of default under Carlyle's lease ("Lease") because nVidia had performed extensive due diligence of 3dfx, including a review of the Lease, prior to executing the nVidia Agreement. Nevertheless, the nVidia Agreement required 3dfx to breach Carlyle's Lease by, among other things, winding up its business and dissolving.

nVidia initially offered to pay \$100,000,000 cash for substantially all of 3dfx's assets, which would have been available in the entirety to 3dfx's creditors. The directors and officers of 3dfx ("3dfx Ds&Os") were also shareholders of 3dfx who held lucrative stock options. The 3dfx Ds&Os declined that offer and devised a scheme to divert funds away from 3dfx's creditors to 3dfx's shareholders, with nVidia's help.

Under the nVidia Agreement, 3dfx would receive the stock (then worth over \$50,000,000) only if 3dfx discharged the \$119,000,000 owed to creditors with only the \$70,000,000 in cash. 3dfx could not use the stock to discharge liabilities to creditors. If 3dfx failed, nVidia would keep the 1,000,000 shares of stock. If 3dfx succeeded, the 1,000,000 shares of stock would go to 3dfx's insiders. Paragraph 1.3(a) of the nVidia Agreement provides:

The Stock Consideration . . . shall only become deliverable by [nVidia Sub] to [3dfx] upon and subject to the completion of the winding up of the business of [3dfx] pursuant

to the Plan of Dissolution, and delivery to [nVidia Sub] of a certificate . . . that all Liabilities of [3dfx and its subsidiaries and affiliates] have been paid . . . **from sources other than the Stock Consideration** and that [3dfx] has been validly dissolved. . . .¹

If 3dfx had persuaded its creditors to accept substantially less than the amounts owed by claiming that only \$70,000,000 in cash was available under the nVidia Agreement to discharge more than \$119,000,000 in liabilities, 3dfx would have succeeded in diverting more than \$50,000,000 worth of nVidia stock to 3dfx's insiders and shareholders, at the expense of 3dfx's creditors. If 3dfx failed, nVidia would keep the 1,000,000 shares of nVidia stock and obtain a \$50,000,000 windfall, at the expense of 3dfx's creditors.

Either way, whether 3dfx won or nVidia won, the creditors were certain to lose.

¹ Under paragraph 1.3(b) of the nVidia Agreement, 3dfx also was provided the option of obtaining a one-time \$25,000,000 payment if (i) the \$70,000,000 Cash Consideration is not sufficient to pay the liabilities of 3dfx and its subsidiaries, and (ii) 3dfx demonstrates that the additional \$25,000,000 payment is sufficient to pay all of the remaining liabilities of 3dfx and its subsidiaries to nVidia's satisfaction. In the event that nVidia advanced the \$25,000,000 payment, the number of shares that constitutes the Stock Consideration would be reduced by 500,000 shares.

If nVidia failed to make the additional \$25,000,000 payment, 3dfx would have received only \$70,000,000 and, faced with \$119,000,000 in liabilities, would have no alternative but to file bankruptcy. Indeed, nVidia failed to make the \$25,000,000 payment, and 3dfx filed bankruptcy.

B. nVidia's Assumption Of Carlyle's Lease

3dfx's rent under Carlyle's Lease was only \$1 per square foot when market rent exceeded \$3 per square foot at the height of the dot com boom in the Silicon Valley. As a result, nVidia knew that Carlyle's Lease was worth at least \$3,000,000 and expressly agreed to assume that Lease under the nVidia Agreement. In December 2000, Carlyle offered to buy out 3dfx's remaining term of the Lease for \$1,000,000 so that Carlyle could relet the building to another tenant at a higher rent. On December 21, 2000, 3dfx asked nVidia how to respond to Carlyle's offer. nVidia ordered 3dfx to reject Carlyle's offer to buy out the Lease.

When 3dfx and nVidia signed the nVidia Agreement on December 15, 2000, the schedules which specify the assets being acquired by nVidia were being finalized and had not yet been attached to the nVidia Agreement. Accordingly, the nVidia Agreement contained a provision stating that such schedules were to be delivered on December 18, 2000. As required under the nVidia Agreement, on December 18, 2000, 3dfx delivered to nVidia the schedules to the nVidia Agreement ("Schedules") identifying the various assets that nVidia had bought on December 15, 2000. The Schedules identified Carlyle's Lease as one of the "Assumed Contracts" that nVidia had assumed under the nVidia Agreement.

By March 2001, however, the "dot com crash" hit, causing a radical downturn in real estate that saw vacancy jump 60% and rents plummet 21%. As a

result, nVidia refused to assume the Lease, despite its agreement to do so under the nVidia Agreement, because the Lease, which had been a \$3,000,000 asset in December 2000, became a \$7,000,000 liability in March 2001. The 3dfx Ds&Os and the directors and officers of nVidia ("nVidia Ds&Os") agreed to switch the December 18, 2000 Schedules with schedules excluding Carlyle's Lease as an "Assumed Contract" after the closing on April 18, 2001 so that nVidia could dump the liability for Carlyle's Lease back on 3dfx, which had been rendered insolvent as of December 15, 2000. Carlyle discovered the existence of the December 18, 2000 Schedules only through discovery after (a) the lawsuit had commenced, (b) Carlyle filed numerous motions to compel against nVidia, and (c) the Bankruptcy Court issued more than \$100,000 in discovery sanctions against nVidia.

C. 3dfx's Breach and Bankruptcy

On April 18, 2001, after the nVidia Agreement closed, 3dfx transferred substantially all of its assets to nVidia, including all of its key patents and intellectual property. The remaining assets were sold for nominal amounts. Overnight, more than 100 of 3dfx's top engineers became nVidia's employees, and the rest were terminated. 3dfx ceased normal business operations, abandoned its facilities, and stopped paying rent under the Lease.

On May 10, 2002, Carlyle filed a complaint in state court against 3dfx, nVidia, and their respective directors and officers. Carlyle's complaint, as amended,

alleged claims for interference with Lease and economic relations, breach of Lease, successor liability, breach of fiduciary duty, and aiding and abetting breach of fiduciary duty, among other causes of action. On October 15, 2002, 3dfx filed bankruptcy.

On January 3, 2003, nVidia, nVidia Sub, and the nVidia Ds&Os (collectively, the "nVidia Defendants") removed Carlyle's action to the Bankruptcy Court. On January 23, 2003, the Bankruptcy Court appointed William A. Brandt, Jr. as the Chapter 11 reorganization trustee for 3dfx (the "Trustee"). On March 12, 2003, the Trustee filed a complaint against nVidia and nVidia Sub for Avoidance of Fraudulent Transfer, Recovery of Voidable Transfer, and De Facto Merger. On September 11, 2008, the Bankruptcy Court entered a judgment in favor of nVidia and nVidia Sub dismissing all of the claims asserted by the Trustee.

Although the nVidia Defendants had removed Carlyle's lawsuit to the Bankruptcy Court and litigated there for three years, on January 18, 2005, the nVidia Defendants filed a Motion for Withdrawal of Reference of Carlyle's action on the ground that the nVidia Defendants were entitled to a jury trial. On May 6, 2005, the District Court entered an order withdrawing the reference of Carlyle's action.

On June 30, 2005, Carlyle filed its Third Amended Complaint, which added claims for express assumption of the Lease and aiding and abetting breach of fiduciary duty. nVidia filed a motion to dismiss the new claims. On November 10, 2005, the

District Court entered an order dismissing, with leave to amend, Carlyle's new claims and dismissing *sua sponte* Carlyle's preexisting claims for lack of standing.

On February 1, 2006, Carlyle filed a Fourth Amended Complaint. Approximately 10 months later, on December 15, 2006, the District Court dismissed the complaint without leave to amend on the grounds that Carlyle's claims are "general creditor claims" because the claims arose from the nVidia Agreement which "affected all creditors," and that Carlyle lacked standing to pursue "general creditor claims" under *CBS, Inc. v. Folks (In re Folks)*, 211 B.R. 378, 387 (B.A.P. 9th Cir. 1997). Pet. App. 14 & 20.

On January 9, 2007, Carlyle filed a Notice of Appeal. On November 25, 2008, the Ninth Circuit affirmed the dismissal of Carlyle's complaint. On January 22, 2009, the Ninth Circuit denied Carlyle's Petition for Rehearing *En Banc*.

D. Basis for Federal Jurisdiction In the Court Of First Instance

The nVidia Defendants removed Carlyle's action to the Bankruptcy Court pursuant to 28 U.S.C. §§ 157, 1334 and 1452. Accordingly, the basis for federal jurisdiction in the court of first instance is 28 U.S.C. §§ 157, 1334 and 1452.

REASONS FOR GRANTING THE PETITION

I. REVIEW IS NECESSARY TO RESOLVE INTER-CIRCUIT AND INTRA-CIRCUIT CONFLICTS REGARDING THE INTERPRETATION OF THIS COURT'S DECISION IN *CAPLIN*

In *Caplin*, the debtor corporation executed an indenture with an indenture trustee pursuant to which the debtor issued \$8,607,600 in debentures. To protect the debenture holders, the debtor covenanted to file certificates with the indenture trustee regarding debtor's obligation to maintain an asset to liability ratio of 2:1. The debtor sustained substantial losses for years without the debenture holders' knowledge because the indenture trustee breached its obligation to confirm the accuracy of the debtor's certificates.

After the debtor filed bankruptcy, the reorganization trustee filed an action on behalf of the debenture holders against the indenture trustee for failing to compel debtor's compliance with the indenture. The reorganization trustee argued that it was more desirable for him to prosecute the claims against the indenture trustee on behalf of all creditors rather than the creditors filing numerous individual lawsuits against the indenture trustee. The Supreme Court rejected this argument, holding that "nowhere in the statutory scheme is there any suggestion that the trustee in reorganization is to assume the responsibility of suing third parties on behalf of debenture holders." *Caplin*, 406 U.S. at 428.

Caplin concerned a cause of action brought by the bankruptcy trustee on behalf of a certain **class** of creditors. *In re Miller*, 197 B.R. 810, 812 (W.D.N.C. 1996) (“*Caplin* concerned a cause of action brought by the bankruptcy trustee on behalf of a class of creditors (not the creditors generally)”). As a result, *Caplin* engendered a split of authority whether a bankruptcy trustee lacks standing to sue on behalf of creditors generally or only a certain class of creditors. *E.F. Hutton & Co. v. Hadley*, 901 F.2d 979 (11th Cir. 1996) (“We recognize that there has been **divergence among the circuits** concerning the ability of a bankruptcy trustee to bring actions against third parties on behalf of creditors of the bankrupt.”); *Miller*, 197 B.R. at 814 (“These **two lines of cases** raise a question that was not asked, and therefore was not answered, in *Caplin*.”).

A review of the decisions interpreting *Caplin* demonstrates that there are profound and irreconcilable inter-circuit and intra-circuit conflicts regarding whether a bankruptcy trustee has standing to pursue “general” claims on behalf of creditors.

A. Inter-Circuit Conflict

The Second Circuit, the Eighth Circuit, the Ninth Circuit, and the Eleventh Circuit read *Caplin* broadly and for the proposition that a bankruptcy trustee cannot bring “general” creditor claims. *Mixon v. Anderson (In re Ozark Restaurant Equipment Co.)*, 816 F.2d 1222 (8th Cir. 1987) (“**no trustee**, whether a

reorganization trustee as in *Caplin* or a liquidation trustee as in the present case, **has power under Section 544 of the Code to assert general causes of action**, such as the alter ego claim, **on behalf of the bankrupt estate's creditors**"); *Williams v. California 1st Bank*, 859 F.2d 664, 667 (9th Cir. 1988) ("**no trustee**, whether a reorganization trustee as in *Caplin* or a liquidation trustee, has power under . . . the Code to assert **general causes of action**, such as [an] alter ego claim, on behalf of the bankrupt estate's creditors."); *E.F. Hutton*, 901 F.2d at 985 ("we approve the reasoning of the Ninth Circuit in *Williams*, an analogous case factually and procedurally, and the Eighth Circuit in *Ozark Equip. Co.*, where those respective circuit courts determined that the bankruptcy trustee does not have standing to assert claims of creditors of the bankrupt"), *Wagoner*, 944 F.2d at 118 ("It is well settled that a bankruptcy **trustee has no standing generally** to sue third parties on behalf of the estate's creditors, but may only assert claims held by the bankrupt corporation itself.").

The Second Circuit, the Seventh Circuit, the Ninth Circuit Bankruptcy Appellate Panel, and the Ninth Circuit in the unpublished opinion below, read *Caplin* narrowly and for the proposition that only the bankruptcy trustee can pursue "general" creditor claims. *Koch Refining v. Farmers Union Cent. Exchg., Inc.*, 831 F.2d 1339, 1349 (7th Cir. 1987) ("A trustee may maintain only a **general claim**."); *CBS, Inc. v. Folks (In re Folks)*, 211 B.R. 378, 387 (B.A.P. 9th Cir.

1997) (“‘If a **claim is a general one**, with no particularized injury arising from it, and if that claim could be brought by any creditor of the debtor, **the trustee is the proper person to assert the claim**, and the creditors are bound by the outcome of the trustee’s action.’”) (citing *Kalb*, 8 F.3d at 132); Pet. App. 6 (“The district court did not err by relying on *In re Folks*, 211 B.R. 378”); *Kalb, Voorhis & Co. v. American Financial Corp.*, 8 F.3d 130, 132 (2d Cir. 1993) (“If a claim is a **general one**, with no particularized injury arising from it, and if that claim could be brought by any creditor of the debtor, **the trustee is the proper person to assert the claim**, and the creditors are bound by the outcome of the trustee’s action.”).

B. Intra-Circuit Conflict

Not only has *Caplin* engendered an inter-circuit split of authority, Courts of Appeals within the same circuit also have interpreted *Caplin* in a profoundly conflicting manner.

For example, the Ninth Circuit’s holding in *Williams*, 859 F.2d at 667, that “**no trustee**, whether a reorganization trustee as in *Caplin* or a liquidation trustee, **has power** under . . . the Code to assert **general causes of action**, such as [an] alter ego claim, on behalf of the bankrupt estate’s creditors,” cannot be reconciled with the Ninth Circuit Bankruptcy Appellate Panel’s holding in *Folks*, 211 B.R. at

387, that an alter ego claim is “a **general claim** and ‘**cannot belong to any individual creditor.**’”

The Second Circuit’s holding in *St. Paul Fire*, 884 F.2d at 700 (“the trustee is the only one with standing to bring a certain action, because of the generalized nature of the injury”), cannot be reconciled with the Second Circuit’s holding in *Wagoner*, 944 F.2d at 118 (“It is well settled that a bankruptcy trustee has no standing generally to sue third parties on behalf of the estate’s creditors”). See also *Miller*, 197 B.R. at 814 n.5 (“**The Court is unable to reconcile the Second Circuit’s** broad view of the trustee’s powers under § 544 in *St. Paul Fire*, *supra*, with the Second Circuit’s later decision in *Shearson Lehman v. Wagoner*, 944 F.2d 114, 118-20 (2nd Cir.1991) where the Court, relying on *Caplin*, held that the bankruptcy trustee for the debtor (HMK) did not have standing to assert claims for dissipation of corporate funds and what seems the equivalent of an alter ego claim against Shearson because those claims belonged to the creditors of HMK, or the Court’s later decision in *Hirsch v. Arthur Andersen & Co.*, 72 F.3d 1085, 1092-94 (2nd Cir.1995), where the Court held that the trustee for the debtor did not have standing to pursue claims of investors in the limited partnerships managed by the debtor against the debtor’s accounting firm.”).

The Seventh Circuit’s holding in *Koch Refining*, 831 F.2d at 1349 (“A trustee may maintain only a general claim”), cannot be reconciled with the Seventh Circuit’s holding in *Steinberg v. Buczynski*, 40

F.3d 890, 893 (7th Cir. 1994) ("The claim in such a case is said to be 'personal,' not 'general.' That is not an illuminating usage. The point is simply that the trustee is confined to enforcing entitlements of the corporation. He has no right to enforce entitlements of a creditor."). See also *Miller*, 197 B.R. at 813 n.4 ("The Court finds the broad view of the trustee's powers advanced in *Koch, supra*, has been eviscerated by the Court's later opinion in *Steinberg v. Buczynski*, 40 F.3d 890 (7th Cir. 1994), where the Seventh Circuit, cited *Caplin, supra*, and held that the trustee for the debtor (Ted's Plumbing, Inc.) did not have standing to assert an action on behalf of a creditor (the pension fund) noting that the distinction between 'personal' and 'general' claims offered in *Koch, supra*, 'is not an illuminating usage' *id.* at 893, a sentiment with which this Court wholeheartedly agrees."); *Alberts v. Tuft (In re Greater Southeast Community Hospital Corp.)*, 2005 WL 3036507 (Bankr. D.D.C. 2005) ("Indeed, the Seventh Circuit effectively overruled *Koch* in *Steinberg v. Buczynski*, 40 F.3d 890 (7th Cir. 1994), for this exact reason.").²

² Similarly, Carlyle believes that the only way to reconcile the Ninth Circuit's decision in *Williams* with the Ninth Circuit B.A.P.'s decision in *Folks* is to overrule *Folks*. The Ninth Circuit in the opinion below declined to do so.

C. A Review Is Necessary To Resolve "Diametrically Opposite" Inter-Circuit And Intra-Circuit Conflicts

Carlyle respectfully believes that this appeal provides a compelling demonstration why the Eighth Circuit in *Mixon*, the Ninth Circuit in *Williams*, the Eleventh Circuit in *E.F. Hutton*, and the Second Circuit in *Wagoner* interpreted *Caplin* correctly and why the Seventh Circuit in *Koch Refining*, the Ninth Circuit Bankruptcy Appellate Panel in *Folks*, the Ninth Circuit in the unpublished opinion below, and the Second Circuit in *Kalb* interpreted *Caplin* incorrectly.

In *Caplin*, the Supreme Court "identified three factors militating against finding standing" for a reorganization trustee. *Williams*, 859 F.2d at 666; *Mixon*, 816 F.2d at 1266; *E.F. Hutton*, 901 F.2d at 986.

"First, nowhere in the statute did the Court find any provision enabling the trustee 'to collect money not owed to the estate.'" *Williams*, 859 F.2d at 666 (quoting *Caplin*, 406 U.S. at 428). Because the rights under a lease accrue only to the landlord, not to creditors of the tenant, only the landlord has standing to sue a third party for inducing the tenant to breach the lease. For example, damages arising from nVidia's interference with the Lease (*i.e.*, the unpaid rents resulting from 3dfx's breach of the Lease) are damages that can be claimed only by Carlyle. The Trustee lacks standing to collect money not owed to

the estate. *Id.* Even if the Trustee could collect money owed to Carlyle, he could not recover any money owed to Carlyle in excess of the "cap," as such funds are not owed by or to the debtor (tenant). 11 U.S.C. § 502(b)(6). See Part III, *infra*. Indeed, the Trustee and the creditors in general have an incentive to "cap" Carlyle's lease damage claims against the 3dfx estate because the "cap" will result in a greater *pro rata* distribution to the unsecured creditors.

"Second, the [Supreme] Court noted that the debtor had no claim against the indenture trustee. At the most, then, the trustee's claims described a situation where the debtor and the indenture trustee were *in pari delicto*. Since it appeared that the indenture trustee would be entitled to be subrogated to the position of the debenture holders against the debtor, the Court saw no advantage to giving the trustee standing to sue." *Id.* (citing *Caplin*, 406 U.S. at 429-30). Here, 3dfx (the debtor) and the nVidia Defendants were also *in pari delicto* as the nVidia Defendants conspired with 3dfx to defraud the creditors of 3dfx. See Part II, *infra*.

"The third problem troubling the [Supreme] Court was the possibility that the trustee's suit on behalf of debenture holders could be 'inconsistent with any independent actions that they might bring themselves.'" *Id.* at 666 (quoting *Caplin*, 406 U.S. at 431-32). As the Ninth Circuit noted in *Williams*:

The failure of the Trustee to obtain assignments from all the investors bears out the

Caplin Court's fear that "it is extremely doubtful that the trustee and all [creditors] would agree on the amount of damages to seek, or even on the theory on which to sue." Inconsistent actions increase the chance that the Trustee will find her interests diverging from those of the investors on whose behalf she is suing.

Id. at 667 (quoting *Caplin*, 406 U.S. at 432).

Here, the Trustee finds that (a) the interests of 3dfx shareholders conflict with the interests of 3dfx creditors,³ (b) the interests of creditors that 3dfx inherited from STB conflict with the interests of other 3dfx creditors, and (c) the interests of 3dfx shareholders and creditors who benefit by "capping" Carlyle's claims conflict with the interests of Carlyle, whose claims against solvent third parties (such as nVidia) should not be capped.

Despite the "three factors militating against finding standing" for a reorganization trustee enunciated by this Court in *Caplin*, the primary reason why the Seventh Circuit in *Koch Refining* and the Second Circuit in *St. Paul Fire* found that a reorganization

³ Indeed, when the Creditors' Committee sought to enter into a settlement with the Trustee before the Bankruptcy Court conducted a trial of the Trustee's claims against nVidia and nVidia Sub, the Trustee opposed the Creditors' Committee's settlement with nVidia on the ground that, "While the assumptions underlying that estimate of recovery to creditors may be subject to challenge, it is clear that equity holders under the settlement would receive nothing."

trustee should have exclusive standing to pursue general creditor claims was the concern of numerous individual lawsuits filed by creditors against third parties. *Miller*, 197 B.R. at 814 ("There is a common-sense concern that drives these decisions. They reason that the Trustee must have authority to pursue causes of action that injure the creditors generally, because otherwise individual creditors will rush to pursue the action and receive judgments, thereby circumventing the equality of distribution among creditors that is so fundamental to the bankruptcy scheme; in order to avoid this result, these courts reason that the trustee (not individual creditors) should have standing to pursue such claims.") (citing *Koch*, 831 F.2d at 1349; *St. Paul Fire*, 884 F.2d at 700-02; and *In re MortgageAmerica Corp.*, 714 F.2d 1266, 1275-76 (5th Cir. 1983)). However, the Supreme Court in *Caplin* already had anticipated and addressed this concern when it explained that "Rule 23 of the Federal Rules of Civil Procedure, which provides for class actions, avoids some of these difficulties." *Id.* at 433. Indeed, the regulatory scheme governing class actions provides far greater due process protections to creditors than conferring exclusive standing on a reorganization trustee in the place of such creditors (for example, the right to opt out if the class representative is inadequate or the right to have its own day in court if the interests of other creditors conflict with the interests of the individual creditor).

Finally, the fact that the Congress had an opportunity to overrule *Caplin* and confer exclusive standing on the reorganization trustee to pursue general creditor claims, and that Congress chose not to do so, demonstrates that the narrow reading of *Caplin* by the Seventh Circuit in *Koch Refining* and the Second Circuit in *St. Paul Fire* is contrary to the Congressional intent and legislative history of 11 U.S.C. § 544. In *Caplin*, this Court expressly invited Congress to decide whether or not to grant such standing to the reorganization trustee.

Congress might well decide that reorganizations have not fared badly in the 34 years since Chapter X was enacted and that the status quo is preferable to inviting new problems by making changes in the system. Or, Congress could determine that the trustee in a reorganization was so well situated for bringing suits against indenture trustees that he should be permitted to do so. In this event, Congress might also determine that the trustee's action was exclusive, or that it should be brought as a class action on behalf of all debenture holders, or perhaps even that the debenture holders should have the option of suing on their own or having the trustee sue on their behalf. Any number of alternatives are available. Congress would also be able to answer questions regarding subrogation or timing of law suits before these questions arise in the context of litigation. Whatever the decision, it is one that only Congress can make.

Caplin, 406 U.S. at 434-35.

As the Eighth Circuit explained in *Mixon*, Congress declined the Supreme Court's invitation to overturn *Caplin*.

In 1978, six years after *Caplin* was decided, Congress overhauled the bankruptcy laws when it enacted the Bankruptcy Code. As part of the revision, Congress consolidated former sections 70c and 70e of the Act (11 U.S.C. §§ 110(c), (e) of former title 11) into Sections 544(a) and (b) of the Code, respectively, which apply to both reorganization and liquidation trustees. Although Section 544 clarified and expanded the trustee's role with respect to creditors, in no way was it changed to authorize the trustee to bring suits on behalf of the estate's creditors against third parties. In fact, the legislative history suggests just the opposite.

As originally proposed by the House, Section 544 was to contain a subsection (c), which was intended to overrule *Caplin*. It is extremely noteworthy, however, that this provision was deleted before promulgation of the final version of Section 544. Because subsection (c), as a part of Section 544, would have applied to both reorganization and liquidation trustees, and because Congress refused to enact subsection (c), we believe Congress' message is clear – no trustee, whether a reorganization trustee as in *Caplin* or a liquidation trustee as in the present case, has power under Section 544 of the Code to assert general causes of action, such as the

alter ego claim, on behalf of the bankrupt estate's creditors.

816 F.2d at 1227-28.

Thus, the interpretation of *Caplin* by the Second Circuit in *Wagoner*, the Eighth Circuit in *Mixon*, the Ninth Circuit in *Williams*, and the Eleventh Circuit in *E.F. Hutton*, is supported by the Congressional intent and legislative history of 11 U.S.C. § 544.

In sum, it has been 37 years since this Court addressed the question of standing between a reorganization trustee and individual creditors in *Caplin*. *Mixon*, 816 F.2d at 1228 ("*Caplin* is still good law and is **the only Supreme Court case to address the standing question**"). Ever since this Court issued its opinion in *Caplin*, the Second, Seventh, Eighth, Ninth, and Eleventh Circuits have interpreted *Caplin* in "diametrically opposite ways," *Koch Refining*, 831 F.2d at 1349, sometimes even within the same Circuit. The Court should grant this petition to clarify and resolve profound inter-circuit and intra-circuit conflicts and confusion regarding the "diametrically opposite" interpretation of *Caplin*.

II. REVIEW IS NECESSARY TO RESOLVE INTER-CIRCUIT CONFLICTS REGARDING THE APPLICATION OF THE WAGONER RULE

The "*Wagoner* rule" states that under the *in pari delicto* doctrine, the reorganization trustee lacks standing to sue third parties for conspiring with a

corporate debtor to defraud creditors. *Wagoner*, 944 F.2d at 118 (“when a bankrupt corporation has joined with a third party in defrauding its creditors, the trustee cannot recover against the third party for the damage to the creditors”). The *Wagoner* rule should apply here because Carlyle alleged that the bankrupt corporation (*i.e.*, 3dfx) conspired with the nVidia Defendants to defraud the creditors of 3dfx by diverting the one million shares of nVidia stock to 3dfx’s insiders under the nVidia Agreement.

Other circuits, including the Ninth Circuit in the opinion below, however, have refused to follow the Second Circuit in applying the *Wagoner* rule. Pet. App. 7 (“However, the *Wagoner* rule has been much criticized and we decline to follow it. See *In re Senior Cottages of Am., LLC*, 482 F.3d 997, 1003-04 (8th Cir. 2007) (listing authorities rejecting *Wagoner* and concluding that the *in pari delicto* defense has nothing to do with trustee standing).”). This appeal provides a compelling demonstration why the Second Circuit in *Wagoner* correctly applied the *Wagoner* rule and why the Eighth Circuit in *Senior Cottages* and the Ninth Circuit in the unpublished opinion below incorrectly refused to follow the *Wagoner* rule.

The Ninth Circuit held here that “the district court properly concluded that the Trustee has **exclusive standing**” to assert general creditor claims. Pet. App. 5. Because (a) the Trustee stands in the shoes of the debtor and its claims against the nVidia Defendants would be barred by the *in pari delicto* doctrine,

Bank of Marin v. England, 385 U.S. 99, 101 (1966) ("trustee succeeds only to such rights as the bankrupt possessed; and the **trustee is subject to all** claims and **defenses which might have been asserted against the bankrupt** but for the filing of the petition"), and (b) innocent creditors are barred from pursuing general creditor claims, the defendants in this case will escape scot-free for their role in conspiring with 3dfx to defraud the creditors.

Indeed, although this Court decided *Caplin* well before the Second Circuit decided *Wagoner*, this Court prophetically recognized and anticipated this exact problem in *Caplin*. *Caplin* articulated "three problems" why a reorganization trustee lacks standing to assert claims on behalf of creditors, one of which was that the trustee was "*in pari delicto*" with the defendant. 406 U.S. at 429-30 ("This brings us to the second problem with petitioner's argument. Nowhere does petitioner argue that Webb & Knapp could make any claim against Marine. Indeed, the conspicuous silence on this point is a tacit admission that no such claim could be made. Assuming that petitioner's allegations of misconduct on the part of the indenture trustee are true, petitioner has at most described a situation where Webb & Knapp and Marine were *in pari delicto*.") (footnote omitted). Thus, *Caplin* confirms that the *Wagoner* rule should be followed.

In sum, the Supreme Court should grant this petition to resolve irreconcilable inter-circuit conflict regarding the application of the *Wagoner* rule.

III. REVIEW IS NECESSARY TO RESOLVE AN ISSUE OF FIRST IMPRESSION WHETHER A REORGANIZATION TRUSTEE HAS STANDING TO PURSUE A LANDLORD CREDITOR'S LEASE DAMAGES IN EXCESS OF THE "CAP"

Carlyle alleged that the nVidia Defendants intentionally and negligently interfered with Carlyle's Lease by (i) contractually requiring 3dfx to discontinue its operations and dissolve, in breach of the Lease, and (ii) failing to assume the Lease after having rendered 3dfx insolvent.

Damages arising from the nVidia Defendants' interference with the Lease (*i.e.*, the unpaid rents resulting from 3dfx's breach of the Lease) are damages that can be claimed only by Carlyle. Rents due under the Lease are owed to Carlyle, not to the tenant (*i.e.*, the 3dfx estate). The Trustee lacks standing to collect money not owed to the estate. *Caplin*, 406 U.S. at 428 (nothing in the Bankruptcy Code enabled the trustee "to collect money not owed to the estate"); *Williams*, 859 F.2d at 667 (the Trustee lacked standing because "the Trustee, as in *Caplin*, is attempting to 'collect money not owed to the estate'").

Even if the Trustee, not Carlyle, has "exclusive standing" to pursue Carlyle's claims (and the Trustee cannot and does not), the Trustee cannot pursue Carlyle's Lease damages in excess of the "cap" imposed by 11 U.S.C. § 502(b)(6) as a matter of law because the "cap" limits the estate's liability to

Carlyle to no more than "the rent reserved by such lease, without acceleration, for the greater of one year, or 15 percent, not to exceed three years, of the remaining term of such lease." In other words, even if the 3dfx estate has sufficient assets to make a 100% distribution to all creditors, it may pay Carlyle only \$3,500,000 under the 11 U.S.C. § 502(b)(6) "cap," not the full \$11,000,000 or more actually owed under the Lease. Since the estate is not liable for more than the capped claim, the Trustee has no standing to pursue claims *in excess* of its capped damages. *Bullfrog Films Inc. v. Wick*, 847 F.2d 502, 506 n.4 (9th Cir. 1988) ("At an 'irreducible minimum' Article III standing requires that a plaintiff show (1) 'that he personally has suffered some actual or threatened injury' as a result of defendant's conduct, (2) that the injury 'fairly can be traced to the challenged action' and (3) that the injury 'is likely to be redressed by a favorable decision.'") (quoting *Valley Forge Christian College v. Americans United For Separation of Church and State*, 454 U.S. 464, 472, 102 S.Ct. 752, 758, (1982)). Thus, even if the Trustee, and not Carlyle, has "exclusive standing" to pursue Carlyle's claims (and the Trustee does not), only Carlyle has standing to pursue Lease damages in excess of the "cap."

Despite extensive research, Carlyle did not find any case law addressing the question whether a reorganization trustee would have standing to pursue lease damages in excess of the "cap" on behalf of a

landlord creditor. The Ninth Circuit in the unpublished opinion below held that:

We are not persuaded that the cap imposed by 11 U.S.C. § 502(b)(6) gives rise to a particularized injury that divests the Trustee of standing. Section 502 deals with allowance of secured claims, not powers of the Trustee, so the cap impairs the Creditors' claims regardless of whether the Trustee or the Creditors pursue the claim.

The Ninth Circuit's reasoning is erroneous. As pointed out by the Ninth Circuit, the "cap" operates as a limitation of a landlord creditor's claims **against the bankrupt estate, not against solvent (indeed, multi-billion dollar) third parties** like nVidia. To the contrary, it is well established that landlord creditors whose claims are capped against the bankruptcy estate have standing to sue third parties for the full amount of their claims in *excess* of the capped amount chargeable to the debtor's estate. 11 U.S.C. § 524(e); *Kopolow v. P.M. Holding Corp. (In re Modern Textile, Inc.)*, 900 F.2d 1184, 1191 (8th Cir. 1990) ("Although the Bankruptcy Code limits the amount which a lessor can claim against the debtor's bankrupt estate following the Trustee's rejection of an unexpired lease, **that limitation does not operate to cut off and extinguish the lessor's claim for amounts in excess of the amount chargeable to the debtor's estate.**").

Kopolow held that the 11 U.S.C. § 502(b)(6) "cap" does not bar lessor's lawsuit against a third party

who “guaranteed the debtor’s lease obligations.” The Court of Appeal reasoned that “under the Bankruptcy Code, even the ‘discharge of debt of the debtor **does not affect the liability of any other entity on . . . such debt.**’” *Id.* (citing 11 U.S.C. § 524(e)).

In *Landsing Diversified Properties-II v. First National Bank and Trust Co. (In re Western Real Estate Fund, Inc.)*, 922 F.2d 592 (10th Cir. 1990), two transformers maintained by a company named PSO exploded, causing substantial damage to the debtor’s facility. The debtor retained an attorney named Abel on a contingency fee basis to litigate against PSO. Abel filed suit against PSO and secured his fees by filing an attorney’s lien under state law. The debtor settled with PSO and agreed to indemnify PSO should it be held liable to Abel for ignoring his attorney’s lien.

The Tenth Circuit held that although Abel’s claim against the debtor’s estate must be “capped” at the reasonable value of Abel’s services pursuant to 11 U.S.C. § 502(b)(4), *id.* at 596-98, it flatly rejected the argument that Abel was barred by the debtor’s settlement and confirmation of the debtor’s plan from pursuing damages in excess of the cap against PSO:

Neither the confirmation of a plan nor the creditor’s recovery (of partial satisfaction) thereunder bars litigation against third parties for the **remainder of the discharged debt. The same holds true specifically where, as here, the creditor’s bankruptcy claim is** based on an executory contract that

is both rejected under section 365(a) and **subject to limitation in amount by the bankruptcy court pursuant to section 502(b).**

Id. at 601 (citation omitted).

Carlyle's claims for damages in excess of the cap cannot, and do not, belong to the Trustee because 3dfx (the debtor) is not liable to Carlyle for rents in excess of the cap. Since the Trustee has no standing to assert injuries which 3dfx has not sustained, the District Court's ruling and the Ninth Circuit's opinion below divest *both* Carlyle and the Trustee of standing to pursue claims for unpaid rents in excess of the "cap" against nVidia, a solvent third party.

The Bankruptcy Code was not designed to protect a solvent third party from wrongdoing. To the contrary, the law is settled that a landlord, like Carlyle, has standing to pursue damages in excess of the "cap" against any third parties. 11 U.S.C. § 524(e); *Kopolow*, 900 F.2d at 1191; *Landsing Diversified*, 922 F.2d at 601; 4 Collier on Bankruptcy ¶502.03[7][f] (the cap "'does not operate to cut off and extinguish the lessor's claim for amounts in excess of the amount chargeable to the debtor's estate,' and thus, the liability of a nondebtor guarantor or co-tenant is not limited or altered by section 502(b)(6)").

In sum, the Court should grant this petition to address a question of first impression whether or not a reorganization trustee would have standing to

pursue lease damages in excess of the "cap" on behalf of a landlord creditor.

IV. REVIEW IS NECESSARY TO DETERMINE WHETHER THE NINTH CIRCUIT ERRED IN FINDING THAT E-MAILS CANNOT SATISFY THE STATUTE OF FRAUDS

The Ninth Circuit below affirmed the dismissal of Carlyle's complaint on the ground that "Carlyle's complaint failed to allege there was a written assumption of the lease signed by NVIDIA." Pet. App. 7. However, Carlyle's complaint alleged that "the Lease was specifically identified and accepted as a Specified Asset and Assumed Contract under the Nvidia Agreement." In any event, the opinion below is contrary to California statute and case law for at least two reasons.

First, the statute of frauds is satisfied because the nVidia Agreement *is* signed. The December 18, 2000 Schedules are merely an exhibit to the signed nVidia Agreement, which 3dfx was required to deliver, and did deliver, on December 18, 2000, as required under the nVidia Agreement. Nothing in the California statute of frauds requires the separate signing of every exhibit and schedule to an agreement, in addition to the signing of the agreement itself. Cal. Civ. Code § 1624(a).

Second, Carlyle alleged that E-mails from nVidia satisfied the statute of frauds. For example, on January 31, 2001, Christine B. Hoberg (the Chief Financial Officer of nVidia) sent an E-mail to Richard A. Heddleson (Chief Executive Officer of 3dfx) demanding that 3dfx remove a mechanic's lien from Carlyle's Lease, as Carlyle's Lease was "one of the assets" that nVidia had "bought." The January 31, 2001 E-mail from nVidia states, "heard about the mechanics lien on the building. **[C]an you pay the \$96k else the lease terminates and one of the assets we bought goes away.**"

If nVidia had not accepted the December 18, 2000 Schedules and purchased Carlyle's Lease, there was no reason why Hoberg would refer to Carlyle's Lease as "one of the assets that we [*i.e.*, nVidia] bought."

California law is well-settled that an E-mail is a sufficient "note or memorandum" that satisfies the statute of frauds. Cal. Civ. Code § 1624 (contracts "are invalid, unless they, or **some note or memorandum thereof**, are in writing and subscribed by the party to be charged or the party's agent"); 1 B.E. Witkin, Summary of California Law § 350 (10th ed. 2005) ("The memorandum is not the contract, but merely evidence of its terms; the oral agreement is the contract. Hence, an oral agreement may originally be subject to the bar of the statute, but may become enforceable if a note or memorandum is subsequently made.").

"If the email had been sent after January 1, 2000, there would be no question of its sufficiency under the Statute of Frauds because the Uniform Electronic Transactions Act, Cal. Civ. Code § 1633.7 (2004), provides that a 'record or signature may not be denied legal effect or enforceability solely because it is in electronic form.'" *Lamle v. Mattel, Inc.*, 394 F.3d 1355, 1362 (Fed. Cir. 2005).⁴ Here, Hoberg sent the E-mail on January 31, 2001, at least one year after the effective date of the Uniform Electronic Transactions Act.

In sum, the Court should grant this petition to correct a manifest error in the opinion below that Carlyle's complaint was barred by the statute of frauds.

⁴ On January 1, 2000, the Uniform Electronic Transaction Act became effective in California. Cal. Civ. Code § 1633.4 ("This title applies to any electronic record or electronic signature created, generated, sent, communicated, received, or stored on or after January 1, 2000."). See also Cal. Civ. Code §§ 1633.7 & 1633.9.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CARRAMERICA REALTY
CORPORATION; CARR-
AMERICA REALTY, LP;
CARR OFFICE PARK, LLC;
CARR TEXAS OP, L.P.,

Plaintiffs-Appellants

and

CARLYLE FORTTRAN TRUST,

Plaintiff

v.

NVIDIA CORPORATION;
NVIDIA US INVESTMENT
COMPANY; JEN-HSUAN
HUANG; JAMES C. GAITHER;
A. BROOKE SEAWELL;
WILLIAM J. MILLER; TENCH
COXE; MARK A. STEVENS;
HARVEY C. JONES; CHRIS-
TINE HOBERG; STEPHEN
PETTIGREW; JAMES
HOPKINS; JAMES WHIMS;
GORDON A. CAMPBELL;
RICHARD A. HEDDLESON;

No. 06-17109

D.C. No.

CV-05-00428-JW

MEMORANDUM*

(Filed Nov. 25, 2008)

* This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

ALEX LEUPP; SCOTT D.
SELLERS,

Defendants-Appellees

3DFX INTERACTIVE, Inc.,

Debtor-in-Possession-
Appellee

WILLIAM A. BRANDT, JR.,

Trustee-Appellee

CARLYLE FORTTRAN TRUST,

Plaintiff-Appellant

v.

NVIDIA CORPORATION;
NVIDIA US INVESTMENT
COMPANY; JEN-HSUAN
HUANG; JAMES C. GAITHER;
A. BROOKE SEAWELL;
WILLIAM J. MILLER;
TENCH COXE; MARK A.
STEVENS; HARVEY C.
JONES; CHRISTINE
HOBERG; STEPHEN PETTI-
GREW; JAMES HOPKINS;
JAMES WHIMS; GORDON A.
CAMPBELL; RICHARD A.
HEDDLESON; ALEX LEUPP;
SCOTT D. SELLERS,

Defendants-Appellees.

No. 07-15077

D.C. No.

CV-05-00427-JW

App. 3

Appeal from the United States District Court
for the Northern District of California
James Ware, District Judge, Presiding

Argued and Submitted July 17, 2008
San Francisco, California

Before: FARRIS, SILER,** and BEA, Circuit Judges.

Plaintiffs CarrAmerica Realty Corporation (“CarrAmerica”), its related corporate entities, and Carlyle Fortran Trust (“Carlyle”) (collectively “Creditors”) appeal the order of the district court dismissing the Creditors’ complaints for lack of standing. The district court held that only the Chapter 11 bankruptcy Trustee (“Trustee”) had standing to pursue the claims. We affirm in part and reverse in part.

I. BACKGROUND

3dfx Interactive, Inc. (“3dfx”) developed and manufactured computer graphics chips. In 1995, it entered into a ten-year commercial lease with Carlyle for 77,805 square feet in an office building in California. In 1998, it leased approximately 26,000 square feet of commercial space in Texas from CarrAmerica. In mid-2000, 3dfx began to experience financial difficulties. Ultimately, 3dfx decided to sell substantially all of its assets to NVIDIA, an unrelated company that also manufactured computer graphics

** The Honorable Eugene E. Siler, Jr., Senior United States Circuit Judge for the Sixth Circuit, sitting by designation.

App. 4

chips. On December 15, 2000, 3dfx and NVIDIA entered into an Asset Purchase Agreement ("APA"), pursuant to which NVIDIA agreed to pay \$70 million in cash for substantially all of 3dfx's assets.

On December 15, 2000, after executing the APA, 3dfx terminated its employees, and NVIDIA immediately rehired them. These NVIDIA employees continued working in the premises leased from CarrAmerica for an unspecified period of time, in violation of 3dfx's lease agreement with CarrAmerica, which agreement barred "anyone other than Tenant and its employees [from occupying] any part of the Premises." NVIDIA instructed 3dfx to continue to pay rent to CarrAmerica and agreed to reimburse 3dfx for these rent payments at a later date.

Eventually, 3dfx stopped paying rent to CarrAmerica and Carlyle. After the Creditors sued for nonpayment of rent, 3dfx filed Chapter 11 bankruptcy in October 2002. The Chapter 11 Trustee sued NVIDIA, seeking avoidance of a fraudulent transfer and recovery under a successor liability theory. The Creditors also filed suit against NVIDIA. The district court dismissed the Creditors' complaints for lack of standing. It held that all of the Creditors' claims alleged generalized injuries to the bankruptcy estate, meaning only the Trustee had standing to pursue the claims. The Creditors now appeal, arguing that the Trustee lacks standing to pursue the claims.

II. DISCUSSION

The district court's holding as to the Trustee's standing is a conclusion of law that we review de novo. *Smith v. Arthur Andersen LLP*, 421 F.3d 989, 1001 (9th Cir. 2005). The allegations of the complaint are taken as true. *Stoner v. Santa Clara County Office of Educ.*, 502 F.3d 1116, 1120 (9th Cir. 2007). A bankruptcy trustee is the representative of the bankrupt estate and has the capacity to sue and be sued. 11 U.S.C. § 323. Among the trustee's duties is the obligation to "collect and reduce to money the property of the estate." 11 U.S.C. § 704(1). The "property of the estate" includes "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). The debtor's "causes of action" are "property of the estate." *Smith*, 421 F.3d at 1002 (citing *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 205 n.9 (1983)). Thus, the trustee "stands in the shoes of the bankrupt corporation and has standing to bring any suit that the bankrupt corporation could have instituted had it not petitioned for bankruptcy." *Id.* The trustee's standing to sue on behalf of the estate is exclusive; a debtor's creditors cannot prosecute such claims belonging to the estate unless the trustee first abandons such claims. *Estate of Spirtos v. One San Bernardino County Superior Court*, 443 F.3d 1172, 1175 (9th Cir. 2006).

Here, the district court properly concluded that the Trustee has exclusive standing to sue with respect to all claims asserted by Creditors based on an

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underlying injury to 3dfx. The substance of most the Creditors' claims is that 3dfx fraudulently transferred its assets to NVIDIA because the APA provided for insufficient consideration. While the Creditors were harmed by the alleged diminution of 3dfx's estate, depleting the assets available for the bankruptcy estate constitutes an injury to the bankrupt corporation itself, not an individual creditor of that corporation. *Smith*, 421 F.3d at 1002.

Most of the Creditors' other arguments lack merit. The district court did not err by relying on *In re Folks*, 211 B.R. 378 (B.A.P. 9th Cir. 1997), because it is consistent with *Smith* and our other decisions on trustee standing. The Creditors' attempt to distinguish *Folks* is unpersuasive. In *Folks*, the analysis of standing to object to the discharge of a debtor rested on whether a purported creditor had standing to pursue an alter ego claim. *Id.* at 381. *Folks* cited, discussed, and properly applied *Williams v. California 1st Bank*, 859 F.2d 664 (9th Cir. 1988). *See Folks*, 211 B.R. at 385-86. We are not persuaded that the cap imposed by 11 U.S.C. § 502(b)(6)¹ gives rise to a

¹ 11 U.S.C. § 502(b)(6) limits the amount of a bankruptcy claim "of a lessor for damages resulting from the termination of a lease of real property" to the extent that the "claim exceeds

(A) the rent reserved by the lease, without acceleration, for the greater of one year, or 15 percent, not to exceed three years, of the remaining term of such lease, following the earlier of –

(i) the date of the filing of the petition; and

(Continued on following page)

particularized injury that divests the Trustee of standing. Section 502 deals with allowance of secured claims, not powers of the Trustee, so the cap impairs the Creditors' claims regardless of whether the Trustee or the Creditors pursue the claim. The district court properly held that the California statute of frauds barred Carlyle's claim that NVIDIA is liable for damages above the cap because Carlyle's complaint failed to allege there was a written assumption of the lease signed by NVIDIA.

The Creditors argue that Trustee standing is barred under *Shearson Lehman Hutton, Inc. v. Wagoner*, 944 F.2d 114, 120 (2d Cir. 1991) ("A claim against a third party for defrauding a corporation with the cooperation of management accrues to creditors, not to the guilty corporation."). However, the *Wagoner* rule has been much criticized and we decline to follow it. See *In re Senior Cottages of Am., LLC*, 482 F.3d 997, 1003-04 (8th Cir. 2007) (listing authorities rejecting *Wagoner* and concluding that the *in pari delicto* defense has nothing to do with trustee standing).

Finally, however, the district court erred in dismissing CarrAmerica's interference with contractual relations and fraud claims based on an alleged

(ii) the date on which such lessor repossessed, or the lessee surrendered, the leased property, plus

(B) any unpaid rent due under such lease, without acceleration, on the earlier of such dates. . . ."

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“secret agreement” between 3dfx and NVIDIA, pursuant to which agreement 3dfx continued to pay rent to CarrAmerica although NVIDIA had taken possession of the premises CarrAmerica leased to 3dfx. CarrAmerica contends that, absent the secret agreement, it could have insisted either that NVIDIA execute a written assumption of the lease or that 3dfx vacate the premises so that CarrAmerica could seek a new tenant. Because these claims are based on an injury to CarrAmerica by NVIDIA, which is neither bankrupt nor protected by any stay of actions, and not an underlying injury to the bankruptcy estate of 3dfx, CarrAmerica has standing to assert these claims.

Costs to be paid by Defendants-Appellees.

AFFIRMED in part, REVERSED and REMANDED in part.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

Carlyle Fortran Trust,

Plaintiff,

v.

nVidia Corporation, et al.,

Defendants.

NO. C 05-00427 JW

**ORDER GRANTING
DEFENDANTS' MOTIONS
TO DISMISS CARLYLE'S
FOURTH AMENDED
COMPLAINT WITH
PREJUDICE**

(Filed Dec. 15, 2006)

I. INTRODUCTION

Carlyle Fortran Trust ("Carlyle") brings this action against nVidia and the former officers and directors of 3dfx, alleging nine causes of action.¹ Carlyle's claims are similar to those made in related case *Carramerica Realty Corp. v. nVidia Corp., et al.*, No. C 05-0428 JW, also pending before the Court. Presently before the Court are two Motions to Dismiss Carlyle's Fourth Amended Complaint, brought respectively by the 3dfx Defendants and the nVidia Defendants. The Court conducted a hearing on April

¹ Defendants nVidia Corporation, nVidia U.S. Investment Company, and individual nVidia executives will be referred to collectively as "nVidia" or the "nVidia Defendants." The former directors and officers of 3dfx will be referred to collectively as "3dfx" or the "3dfx Defendants." When reference is made to all defendants in this case, they will be referred to as "Defendants."

17, 2006. Based on the papers submitted to date and the oral arguments of counsel, the Court GRANTS Defendants' Motions to Dismiss, with prejudice.

II. BACKGROUND

A. Factual Background

The historical facts of this case, with respect to the transaction between 3dfx and nVidia and 3dfx's subsequent bankruptcy are set forth in greater detail in the Court's September 29, 2006 Order Granting Defendants' Motion to Dismiss Carramerica's Third Amended Complaint in the related *Carramerica* case. (See C 05-0428 JW, Docket Item No. 121.) The Court provides only a brief recitation of pertinent facts below.

On August 7, 1995, 3dfx entered into a ten-year commercial lease ("Lease") with Carlyle's predecessor-in-interest; the term of the lease was from May 1, 1997 to April 30, 2007. (Fourth Amended Complaint ¶¶ 38, 40, hereafter, "FAC," Docket Item No. 134.) The lease was for a 77,805 square foot office building located in San Jose, California. (FAC ¶ 38.) Carlyle acquired rights under the Lease and title to the property in September 1999. (FAC ¶ 39.)

On January 1, 2002, 3dfx ceased to pay rent. (FAC ¶ 72.) Carlyle filed an action for breach of lease in Santa Clara County Superior Court. (FAC ¶ 74.) 3dfx filed a petition for dissolution in the same court, which was denied. *Id.* 3dfx then filed for Chapter 11

bankruptcy protection, which resulted in a stay of Carlyle's action for breach of lease as to 3dfx. *Id.*

B. Procedural Background

On January 3, 2003, the nVidia Defendants removed Carlyle's breach of lease action to bankruptcy court. The bankruptcy court subsequently appointed a trustee ("Trustee"). The Trustee filed a complaint against nVidia and its subsidiary, nVidia U.S. Investment Company, based on the asset purchase agreement between nVidia and 3dfx. The Trustee filed a similar action against the 3dfx Defendants in San Mateo County Superior Court.

In light of the Trustee's lawsuits, nVidia and 3dfx moved to dismiss Carlyle's action against them. The motions were granted with leave to amend. Carlyle has now filed its Fourth Amended Complaint, alleging the following claims: (1) Intentional Interference with Contractual Relations (against nVidia Defendants); (2) Negligent Interference with Economic Relations (against nVidia Defendants); (3) Successor Liability (against nVidia Defendants²); (4) Breach of Lease (against nVidia Defendants); (5) Breach of Fiduciary Duty (against 3dfx Defendants); (6) Aiding and Abetting Breach of Fiduciary Duty (against nVidia Defendants); (7) Declaratory Relief (against all

² The Third Cause of Action is asserted against nVidia Corp. and nVidia U.S. Investment Corp., but not against the individual nVidia Defendants. (FAC ¶¶ 165-171.)

Defendants); (8) Unfair Business Practices (against all Defendants); and (9) Tort of Another (against all Defendants). Presently before the Court are Defendants' two Motions to Dismiss Carlyle's Fourth Amended Complaint.

III. STANDARDS

Pursuant to Federal Rule of Civil Procedure 12(b)(6), a complaint may be dismissed against a defendant for failure to state a claim upon which relief can be granted against that defendant. Dismissal may be based on either the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. *Balistrer v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990); *Robertson v. Dean Witter Reynolds, Inc.*, 749 F.2d 530-, 533-534 (9th Cir. 1984). For purposes of evaluating a motion to dismiss, the court "must presume all factual allegations of the complaint to be true and draw all reasonable inferences in favor of the nonmoving party." *Usher v. City of Los Angeles*, 828 F.2d 556, 561 (9th Cir. 1987). Any existing ambiguities must be resolved in favor of the pleading. *Walling v. Beverly Enters.*, 476 F.2d 393, 396 (9th Cir. 1973).

However, mere conclusory allegations couched in factual allegations are not sufficient to state a cause of action. *Papasan v. Allain*, 478 U.S. 265, 286 (1986); see also *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 810 (9th Cir. 1988). A complaint should not be dismissed under Rule 12(b)(6) unless "it appears beyond

doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *Moore v. City of Costa Mesa*, 886 F.2d 260, 262 (9th Cir. 1989). Courts may dismiss a case without leave to amend if the plaintiff is unable to cure the defect by amendment. *Lopez v. Smith*, 203 F.3d 1122, 1129 (9th Cir. 2000).

The Federal Rules of Civil Procedure have established a liberal standard of "notice pleading." A plaintiff's factual pleading is sufficient if it contains "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2) & (e)(1). The Supreme Court has explained that the Federal Rules "do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the rules require is 'a short and plain statement of the claim' that will give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley v. Gibson*, 355 U.S. 41, 47 (1957) (quoting Fed. R. Civ. P. 8(a)(2)). The Supreme Court has reaffirmed the liberal notice-pleading requirements by stating that a prima facie case is "an evidentiary standard, not a pleading requirement." *Swierkiewicz v. Sorema*, 534 U.S. 506, 510 (2002).

IV. DISCUSSION

A. Order in Related Case

Both Carlyle's lawsuit and related case *Carramerica Realty Corp. v. nVidia Corp., et al.*, No. C 05-0428 JW, are actions brought by landlords against nVidia and former directors and officers of 3dfx. Both actions claim that the terms and circumstances of 3dfx's sale of assets to nVidia adversely affected 3dfx's ability to pay rent. In its September 29, 2006 Order in *Carramerica*, the Court dismissed the plaintiff's Third Amended Complaint, with prejudice as to all but one claim, for lack of standing. (See *Carramerica*, Docket Item No. 121 at 4, hereafter, "*Carramerica* Order.") The Court held that under California law as interpreted by the Ninth Circuit, standing to pursue a general creditor's cause of action is delegated exclusively to the bankruptcy trustee unless a creditor can show personalized injury, which the plaintiff landlord could not allege.³ *Id.*

B. Lack of Standing

The threshold issue before the Court is whether Carlyle possesses standing to assert its claims

³ A cause of action is general "if the liability is to all creditors of the corporation without regard to the personal dealings between [the corporation's] officers and creditors." (*Carramerica* Order at 5, quoting *Kalb. Vookis Corp. v. Am. Fin. Corp.*, 8 F.3d 130 (2nd Cir. 1993)). A cause of action is personal to the creditor if "the claimant himself is harmed and no other claimant or creditor has an interest in the case." *Id.*

against Defendants. Since many of the allegations of Carlyle's Fourth Amended Complaint are identical to the allegations disallowed by the Court for lack of standing in *Carramerica*, Defendants contend that Carlyle similarly lacks standing to assert its claims against them.⁴ (Memorandum of Points and Authorities in Support of nVidia Defendants' Motion to Dismiss Carlyle's Fourth Amended Complaint at 7-11, hereafter, "nVidia Motion," Docket Item No. 153; Memorandum of Points and Authorities in Support of Motion to Dismiss Fourth Amended Complaint at 10-11, hereafter, "3dfx Motion," Docket Item No. 142.)

Carlyle's response is a tripartite theory of particularized injury that was not advanced in *Carramerica*. (Opposition of Carlyle Fortran Trust to nVidia Defendants' Motion to Dismiss Carlyle's Fourth Amended Complaint at 7, hereafter, "Carlyle's Opposition to nVidia's Motion," Docket Item No. 160.) First, Carlyle contends that it is the sole entity entitled to recover rent owed under the lease from nVidia, which assumed 3dfx's obligations. This rent was owed to Carlyle, not to 3dfx, and nVidia's obligation remains regardless of whether 3dfx dissolves. Second, after 3dfx and nVidia closed their asset purchase

⁴ With respect to Carlyle's claims against the 3dfx Defendants, on September 21, 2004, the Trustee and the 3dfx Defendants entered into a Settlement Agreement and Mutual Release ("Settlement Agreement") pursuant to which the 3dfx Defendants were to pay \$5.5 million. The bankruptcy court approved the Settlement Agreement on November 19, 2004.

agreement, all creditors except Carramerica and Carlyle were allegedly paid 55 to 70 percent of their claims. *Id.* (citing FAC ¶¶ 111-113.) Third, 11 U.S.C. § 502(b)(6) imposes a “cap” on the dissipation of 3dfx’s assets, such that even if the estate had assets sufficient to pay 100 percent of all claims, the estate would still pay Carlyle only \$3 to \$3.5 million, rather than the full \$11 to \$12 million owed under the lease. Carlyle contends that the Trustee has no standing to pursue claims in excess of the capped damages, as there is no injury to the estate; accordingly, only Carlyle has standing to sue for the amount owed in excess of the statutory cap. *Id.* at 7-8. Carlyle relies upon two cases in support of its theory of standing. *In re Modern Textile, Inc.*, 900 F.2d 1184 (8th Cir. 1990) and *In re Western Real Estate Fund, Inc.*, 922 F.2d 592 (10th Cir. 1990). (Carlyle’s Opposition to nVidia’s Motion at 8.)

In the case of *In re Modern Textile, Inc.*, buyer purchased the business and operating assets of seller and executed a lease of seller’s facilities. The lease was guaranteed by buyer’s parent and sister companies (“guarantors”). 900 F.2d at 1186-87. The buyer subsequently defaulted, and the seller sued the guarantors. Buyer was forced into bankruptcy, and the seller’s suit against the guarantors was removed to bankruptcy court. In bankruptcy court, the trustee of buyer’s estate rejected the unexpired portion of the lease pursuant to 11 U.S.C. § 365. *Id.* at 1187. The Eighth Circuit nevertheless allowed seller’s claim against the guarantors: “[a]lthough [Section 502(b)(6)]

of] the Bankruptcy Code limits the amount which a lessor can claim against the debtor's bankrupt estate following the Trustee's rejection of an unexpired lease, that limitation does not operate to cut off and extinguish the lessor's claim for amounts in excess of the amount chargeable to the debtor's estate." *Id.* at 1191 (internal citations omitted). Since the seller's claim survived the trustee's rejection, seller could still recover from guarantor. *Id.* The Eighth Circuit's conclusion was buoyed by 11 U.S.C. § 524(e), which provides, "the discharge of a debt of the debtor does not affect the liability of any other entity on . . . such debt." *Id.* at 1192.

Carlyle's second case is the Tenth Circuit case of *In re Western, Inc.* In that case, two transformers maintained by the Public Service Company of Oklahoma (PSO) exploded, damaging debtor's facility. 922 F.2d at 594. Debtor's counsel pursued litigation against PSO for a reduced hourly fee supplemented by a reduced contingent fee. Counsel secured his fee via attorney's lien. Debtor subsequently petitioned for Chapter 11 bankruptcy, settled its case against PSO, and agreed to indemnify PSO should it be held liable to counsel for ignoring the attorney's lien. The Tenth Circuit held that (1) contractual rights and obligations remain notwithstanding the trustee's rejection of an executory portion of the contract and (2) notwithstanding the discharge of a debtor's obligation to pay, the creditor can still collect from other entities liable for the debt. *Id.* at 595, 600. The court specifically held that even the creditor's recovery of partial

satisfaction does not bar litigation against third parties for the remainder of the discharged debt, even if the claim stems from an executory contract subject to limitation pursuant to 11 U.S.C. § 501(b). *Id.* at 601.

No Ninth Circuit case has held that a landlord may state a particularized injury for a claim against a third party for rents in excess of the Section 502 damages cap. To the contrary, the case of *In re Perry Arden* casts doubt on this proposition. 176 F.3d 1226 (9th Cir. 1999). In that case, lessor and lessee entered into a long-term lease, guaranteed by guarantor, which lessee subsequently breached. Lessor sued lessee and guarantor in state court for damages, and the state court granted a prejudgment writ of attachment. Before the state court case concluded, guarantor filed for Chapter 11 bankruptcy, and lessor filed an unsecured creditor's claim in the amount of the prejudgment attachment. The parties disputed whether the damages cap should apply to lessor's claim. *Id.* at 1227-28. The Ninth Circuit held in a case of first impression that the damages cap in Section 502(b)(6) applied to lease guarantors. More generally, the court held, "[a] plain reading of [Section 502(b)(6)] underscores that it is the claim of the lessor, not the status of the lessee – or its agent or guarantor – that triggers application of the [damages] Cap." *Id.* at 1229. The Court found that the only two predicates to application of the damages cap were a "claim of a lessor" and "damages resulting from the termination of a lease of real property." *Id.*

In this case, both predicates are present. Carlyle's claim is undisputedly a claim of a lessor. Moreover, Carlyle seeks damages resulting from the termination of a lease of real property. However, since the Ninth Circuit's holding applying the damages cap placed substantial weight on the insolvency of the *In re Perry Arden* guarantor or lessee, the Court does not construe the case as absolutely barring Carlyle's claims against nVidia, a solvent third-party. Accordingly, the Court accepts as cognizable the theory that a landlord, here Carlyle, has standing to state a particularized injury for a claim against a third party, here nVidia, for rents in excess of Section 502's damages cap. The Court proceeds to consider whether Carlyle's Fourth Amended Complaint states such a claim.

C. Intentional Interference with Contract

Carlyle's First Cause of Action is asserted against the nVidia Defendants for intentional interference with contract relations. Carlyle alleges that the nVidia Defendants intentionally interfered with the contractual relationship between Carlyle and 3dfx by preventing Carlyle from "buying out" the lease from 3dfx and reletting the premises while the market was "hot," forcing 3dfx to discontinue its operations, dissolve, and liquidate, and failing to assume the lease. (FAC ¶¶ 136-146.)

Under California law, a cause of action for intentional interference with contract has five elements:

(1) the existence of a valid contract between the plaintiff and a third party; (2) the defendant's knowledge of the contract; (3) the defendant's intentional act designed to induce a breach or disruption of the contractual relationship; (4) actual breach or disruption of the contractual relationship; and (5) resulting damages. *Tuchscher Development Enters., Inc. v. San Diego Unified Port Dist.*, 106 Cal. App. 4th 1219, 1239 (2003).

Carlyle's claim fails for two independent reasons. First, it is not a particularized claim against a third party for rent in excess of the 502(b)(6) cap. Rather, it is based on the Asset Purchase Agreement between nVidia and 3dfx, and as such, concerns events that affected all creditors. There exists no significant difference between this claim and the claim for intentional interference with contract in *Carramerica*, which the Court dismissed. (See *Carramerica* Order at 5-6.) Second, Carlyle cannot state a claim based on its allegation that the nVidia Defendants "prevent[ed] Carlyle from buying out the Lease from 3dfx and reletting the Premises when the market was hot." (FAC ¶ 142.) Carlyle does not allege that 3dfx was bound by the lease to accept Carlyle's buyout offer. It logically follows that even if nVidia prevented Carlyle from buying out the lease from 3dfx, nVidia's action did not cause 3dfx to breach the lease. As such, this first allegation does not satisfy the third and fourth elements of a claim for intentional interference with contract.

The Court dismisses Carlyle's claim for intentional interference with contract against the nVidia Defendants. The Court previously determined that Carlyle does not have standing to pursue this claim, as it is a general injury. (See Order Dismissing Third Amended Complaint with Leave to Amend at 4-5, hereafter, "Order Dismissing TAC," Docket Item No. 133.) Carlyle has nonetheless relied verbatim on the allegations in its Third Amended Complaint to support its intentional interference with contract claim in the Fourth Amended Complaint. (Compare Third Amended Complaint ¶¶ 83-92, hereafter, "TAC," Docket Item No. 62, with FAC ¶¶ 136-146.) Accordingly, the Court dismisses Carlyle's First Cause of Action for intentional interference with contract against the nVidia Defendants with prejudice.

D. Negligent Interference with Economic Relations

Carlyle's Second Cause of Action is asserted against the nVidia Defendants for negligent interference with economic relations. Carlyle alleges that nVidia breached its duty of care not to interfere with the economic relationship between 3dfx and Carlyle. The factual allegations supporting this claim parallel those for Carlyle's claim for intentional interference with contract, above. (FAC ¶¶ 150-161.)

Under California law, this tort arises only where the defendant owes the plaintiff a duty of care. *Stolz v. Wong Comm. L.P.*, 25 Cal. App. 4th 1811, 1825

(1994). To establish a duty of care, the plaintiff must allege the defendant's "blameworthy" conduct; that is, conduct that is "independently wrongful apart from the interference itself." *Lange v. TIG Ins. Co.*, 68 Cal. App. 4th 1179, 1187 (1998) (internal citations omitted). An act is not independently wrongful "merely because defendant acted with an improper motive," but only if "it is proscribed by some constitutional, statutory, regulatory, common law, or other determinable legal standard." *Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134, 1158 (2003).

As above, this is not a particularized claim against the nVidia Defendants for rent in excess of the Section 502(b)(6) damages cap. Rather, underlying any claim for negligent interference with the economic relations between Carlyle and 3dfx is the implicit allegation that nVidia paid an insufficient amount for 3dfx's assets. This claim belongs to the Trustee. Accordingly, the Court dismisses Carlyle's Second Cause of Action for negligent interference with economic relations against the nVidia Defendants with prejudice.

E. Successor Liability

Carlyle's Third Cause of Action is a theory of successor liability asserted against the nVidia Defendants. Carlyle alleges that nVidia acquired substantially all of 3dfx's assets for inadequate consideration, and bears successor liability for two reasons: (1) nVidia paid insufficient consideration

for the fraudulent purpose of allowing 3dfx to evade its obligation to Carlyle under the Lease and (2) nVidia agreed to assume the lease pursuant to the APA. (FAC ¶¶ 166, 168.) The Court considers each of Carlyle's theories in turn.

In California, the default presumption is corporate successor *non-liability*; that is, a corporation that purchases all or most of the assets of another corporation is generally not liable for the debts and liabilities of the selling corporation. *McClellan v. Northridge Park Townhome Owners Ass'n, Inc.*, 89 Cal. App. 4th 746, 753 (2001) (quoting *Ortiz v. South Bend Lathe*, 46 Cal. App. 3d 842, 846 (1975)). This presumption is based on the generally established principle that "a sale of corporate assets transfers an interest separable from the corporate entity and does not result in a transfer of unbargained-for liabilities from the seller to the purchaser." *Hall v. Armstrong Cork, Inc.*, 103 Wn.2d 258, 262 (1984).

The four recognized exceptions to successor non-liability under California law are (1) the purchaser's express or implied assumption of liability; (2) a de facto merger of the two corporations; (3) a purchasing corporation that is a "mere continuation" of the selling corporation; and (4) a fraudulent transaction to escape liability for debts. *McClellan*, 89 Cal. App. 4th at 753 (internal citations omitted). These exceptions were developed to protect the rights of commercial creditors and dissenting shareholders following corporate acquisitions. *Hall*, 103 Wn.2d at 262.

Carlyle alleges each of these four exceptions to successor non-liability. (FAC ¶ 169.) However, Carlyle lacks standing to bring its claim under its first theory of successor liability, that nVidia's purchase of 3dfx's assets left 3dfx without a means to pay its debts. This is because this theory (regardless of which exception to successor non-liability is used) relies on harm that affected 3dfx as a corporation, and such claims belong to the Trustee. This first theory is not affected by the damages cap. The Court considers and dismisses Carlyle's second theory, that the nVidia Defendants assumed a rental obligation, below in its discussion of Carlyle's Fourth and Fifth Causes of Action. Accordingly, the Court dismisses Carlyle's Third Cause of Action for successor liability against the nVidia Defendants with prejudice.

F. Breach of Lease

Carlyle's Fourth Cause of Action is asserted against the nVidia Defendants for breach of lease. Carlyle alleges two alternate theories: (1) 3dfx is now nVidia, by virtue of a de facto merger to which successor liability applies or (2) nVidia became the tenant under the Lease in April 2001 by virtue of an express agreement to assume the Lease. (FAC ¶ 173.)

The California statute of frauds provides that an agreement for the lease of real property for a term exceeding one year is invalid unless evidence of the contract is writing and subscribed by the party to be charged. Cal. Civ. Code § 1624(a)(3). For a contract to

which the statute of frauds applies, all material terms must be reduced to writing; none can be supplied by parol evidence. *Riley v. Bear Creek Planning Committee*, 17 Cal. 3d 500, 509 (1976) (partially overruled on other grounds).

The Trustee does not have standing to pursue a claim against nVidia for unpaid rent beyond the Section 502(b)(6) damages cap. Applying the reasoning of Section IV.A above, Carlyle may state a claim against the nVidia Defendants for failure to pay rent in excess of the damages cap, absent any other legal impediment. Here, the Court finds that the statute of frauds applies to bar Carlyle's claim. The nVidia Defendants allegedly assumed the lease in April 2001. (FAC ¶ 173.) nVidia's assumption of the Lease is allegedly evidenced by Exhibit B of the December 18, 2000 schedules, entitled "Specified Assets and Assumed Contracts."⁵ (FAC ¶ 92, Ex. C.) However, the document is not subscribed by nVidia, the party to be charged under the statute of frauds. (*See id.*, Ex. C.) Rather, the document is a facsimile version of a blackline revision of the Schedules to the Asset Purchase Agreement, sent from 3dfx to Steve Pettigrew, an nVidia in-house attorney. As such, it is plainly preliminary and does not evidence nVidia's consent to

⁵ This document is attached to the Fourth Amended Complaint. (*See* FAC, Ex. C.) Accordingly, the Court properly considers it in evaluating the nVidia Defendants' Motion to Dismiss. *See, e.g. Parks School of Business v. Symington*, 51 F.3d 1480, 1484 (9th Cir. 1995).

assume the Lease. Since the documents do not satisfy the statute of frauds, Carlyle's claim for breach of lease is barred to the extent that it relies on the theory that the nVidia Defendants expressly agreed to assume the Lease.

Further, Carlyle may not rely on the existence of any alleged implied agreement; to permit recovery on such a theory defeats the purpose of the statute of frauds to prevent fraud and perjury. Lastly, Carlyle may not rely on parol evidence to establish the writing. *See Riley*, 17 Cal. 3d at 509. Accordingly, the Court dismisses Carlyle's Fourth Cause of Action for breach of lease against the nVidia Defendants with prejudice.

G. Breach of Fiduciary Duty

Carlyle's Fifth Cause of Action is asserted against the 3dfx Defendants for breach of fiduciary duty. Carlyle alleges that the 3dfx Defendants breached their fiduciary duties in at least five ways. First, they treated Carlyle differently than other 3dfx creditors. Second, they failed to enforce or disclose to Carlyle that nVidia had agreed to assume the Lease. Third, they allowed nVidia to decide whether to allow Carlyle to buyout the Lease. Fourth, they approved and closed the Asset Purchase Agreement in disregard of the express terms of the Lease, including rights provided to Carlyle. Fifth, they negotiated the APA in a manner that unjustly promoted the interests of 3dfx

shareholders and certain classes of creditors and the expense of other creditors. (FAC ¶ 181.)

The Court dismissed the first,⁶ fourth, and fifth of these allegations, which previously appeared in Carlyle's Third Amended Complaint, pursuant to *In re Folks*, 211 B.R. 378 (9th Cir. BAP 1997). (Order Dismissing TAC at 6; see also TAC ¶ 144(a)-(c)). The Court declines to revisit its earlier holding.⁷ Carlyle's second allegation is premised on nVidia's alleged assumption of the Lease, which is unenforceable under the statute of frauds, as explained in Section IV.F, *supra*. The sole surviving theory underlying Carlyle's Fifth Cause of Action, then, is Carlyle's third

⁶ With respect to Carlyle's first allegation, the Court additionally notes that Cal. Civ. Code § 3432 provides, "A debtor may pay one creditor in preference to another, or may give to one creditor security for the payment of his demand in preference to another."

⁷ In its previous Order, the Court held that a claim could be stated that the 3dfx Defendants breached their fiduciary duties to 3dfx creditors when the company was in the zone of insolvency, but that Carlyle was not the proper party to bring that claim. The Ninth Circuit found in *In re Folks* that derivative claims on an insolvent corporation's behalf are asserted exclusively by the bankruptcy trustee. 211 B.R. at 384-85. Accordingly, the Court held, "Because the claim that Defendants breached their fiduciary duty by entering into an APA which did not provide enough in cash for the bankruptcy estate is general to all creditors, the rule of *In re Folks* that the trustee has exclusive jurisdiction to assert claims where 'liability is to all creditors of the corporation' bars Carlyle from asserting a claim for breach of fiduciary duty against the 3dfx Defendants." (Order Dismissing TAC at 6-7.)

allegation, that 3dfx allowed nVidia to decide whether or not to allow Carlyle to buy out the Lease.

The elements of a cause of action for breach of fiduciary duty are: (1) existence of a fiduciary duty; (2) breach of that duty; and (3) damages proximately caused by the breach. *Stanley v. Richmond*, 35 Cal. App. 4th 1070, 1086 (1995). Ordinarily, corporate directors do not owe fiduciary duties to creditors; rather, the relationship between creditors and corporate debtors is contractual in nature. *Official Comm. of Bond Holders of Mericom, Inc. v. Derrickson*, 2004 WL 2151336, *3 (N.D. Cal. Feb. 25, 2004). When a corporation becomes insolvent, however, the insolvency triggers fiduciary duties of directors for the benefit of creditors. *Id.* (quoting *In re Hechinger Investment Co. of Delaware*, 274 B.R. 71, 84 (D. Del. 2002)).

Carlyle alleges that the 3dfx Defendants owed it fiduciary duties, as directors and officers of a corporation on the brink of insolvency. (FAC ¶ 180.) The Court finds that the 3dfx Defendants at most owed a general duty to all creditors. Any breach of the duty inherent in the signing and execution of the APA affected all of 3dfx's creditors. If the 3dfx Defendants allowed nVidia to decide whether or not to allow Carlyle to buy out the Lease pursuant to the APA, then this is at most one manifestation of breach of the generalized duty that the 3dfx Defendants owed to all 3dfx creditors. The Court finds that it does not represent a particularized injury to the landlord. Accordingly, the Court dismisses Carlyle's Fifth Cause of

Action for breach of fiduciary duty against the 3dfx Defendants with prejudice.

H. Aiding and Abetting Breach of Fiduciary Duty

Carlyle's Sixth Cause of Action is asserted against the nVidia Individual Defendants for aiding and abetting the 3dfx Defendants' breach of fiduciary duty. Carlyle alleges that the nVidia Individual Defendants (1) approved the 3dfx executives' disparate treatment of Carlyle; (2) failed to disclose to Carlyle that nVidia agreed to assume the Lease under the nVidia agreement; (3) caused 3dfx to reject Carlyle's efforts to buy out the Lease; (4) failed to proceed with assumption of the Lease; and (5) approved and closed on the APA. (FAC ¶ 185.)

Under California law, liability may be imposed on one who aids and abets the commission of an intentional tort, including breach of fiduciary duty, if the person (1) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other to so act or (2) gives substantial assistance to the other in accomplishing a tortious result and the person's conduct, separately considered, constitutes a breach of duty to a third person. *Casey v. U.S. Bank Nat'l Ass'n*, 127 Cal. App. 4th 1138, 1144 (2005). The Court found analogous allegations insufficient to support Carlyle's cause of action against the 3dfx Defendants for breach of fiduciary duty. Again, any alleged breach of fiduciary

duty by the 3dfx Defendants, or aiding and abetting of that tort by the nVidia Individual Defendants, affected all creditors generally. Accordingly, the Court finds that this claim properly belongs to the Trustee. The Court dismisses Carlyle's Sixth Cause of Action for Aiding and Abetting Breach of Fiduciary Duty against the nVidia Individual Defendants with prejudice.

I. Declaratory Relief

Carlyle's Seventh Cause of Action is asserted against all Defendants for declaratory relief. Carlyle seeks a judicial determination of the rights and duties of Carlyle and all Defendants. (FAC ¶ 191.) A request for declaratory relief does not create a new cause of action. Rather, the plaintiff must specifically plead an "actual, present controversy" and provide the facts of the respective claims concerning the underlying subject. The plaintiff cannot satisfy the requirement to allege an "actual, present controversy" merely by pointing to the lawsuit in which he or she seeks declaratory relief. *City of Cotati v. Cashman*, 29 Cal. 4th 69, 80 (2002) (internal citations omitted). Here, Carlyle's claim for declaratory relief is wholly derivative of its preceding claims. Consistent with the views previously expressed in this Order, the Court dismisses Carlyle's Seventh Cause of Action for Declaratory Relief against all Defendants with prejudice.

J. Unfair Business Practices

Carlyle's Eighth Cause of Action is asserted against all Defendants for unfair business practices. Carlyle alleges that the Defendants' previously described actions constitute unlawful, unfair, or fraudulent business practices within the meaning of California Business and Professions Code § 17200. (FAC ¶ 193.) Specifically, the nVidia Defendants conspired to defraud 3dfx's creditors by entering into the APA and labeling it an "asset purchase agreement" rather than a merger or consolidation, in order to obtain substantially all of 3dfx's assets while escaping liability for its debts. (FAC ¶¶ 47, 58.) Carlyle further alleges that the 3dfx Defendants were involved in this fraudulent conspiracy. (FAC ¶ 194.)

Under § 17200, "any unlawful, unfair, or fraudulent business act or practice" is prohibited. Cal. Bus. & Prof. Code § 17200. "Unlawful" conduct is conduct "forbidden by law, be it civil or criminal, federal, state, or municipal, statutory, regulatory, or court-made." *Saunders v. Sup. Ct.*, 27 Cal. App. 4th 832, 839 (1994) (citing *People v. McKale*, 25 Cal. 3d 626, 632 (1979)). "Unfair" conduct means "any practice whose harm to the victim outweighs its benefits." *Id.* (citing *Motors, Inc. v. Times Mirror Co.*, 102 Cal. App. 3d 735, 740 (1980)). "Fraudulent" conduct is conduct likely to deceive members of the public; it does not refer to the tort of fraud. *Id.* (citing *Bank of the West v. Sup. Ct.*, 2 Cal. 4th 1254, 1267 (1992)).

The Court finds that Carlyle's allegations are sufficient to state a claim under the unfair act or

practice prong of Section 17200. However, as before, this claim affected all creditors alike, and consequently belongs to the Trustee. The Court dismisses Carlyle's Eight [sic] Cause of Action for Unfair Business Practices against all Defendants with prejudice.

K. Tort of Another

Carlyle's Ninth Cause of Action is for tort of another against the nVidia Defendants. Carlyle alleges that due to the nVidia Defendants' tortious conduct, Carlyle was required to pursue damages against 3dfx for breach of lease, to prosecute claims in the instant action, and to assert claims against 3dfx in its bankruptcy proceeding. (FAC ¶ 199.)

In California, the general rule, subject to several exceptions, is that each party must pay his or her own attorneys' fees. Cal. Code Civ. Proc. § 1021. One of the exceptions is the "tort of another," or "third party tort" exception, which allows the plaintiff to recover attorneys' fees when he or she has employed counsel to prosecute or defend a third party action because of the defendant's tortious conduct. *Gray v. Don Miller & Associates, Inc.*, 35 Cal.3d 498, 504 (1984). A plaintiff's "entitlement to recoupment of any attorney fees as damages arising from [defendant's] allegedly tortious behavior depends upon plaintiff's success in proving that tortious conduct in fact occurred." See *Shapiro v. Sutherland*, 64 Cal. App. 4th 1534, 1551 n.19 (1998).

The Court finds that Carlyle's claim for tort of another is wholly derivative of its other claims, which have been dismissed. Accordingly, the Court dismisses Carlyle's Ninth Cause of Action for Tort of Another against the nVidia Defendants with prejudice.

L. nVidia's Motion to Strike

The Court acknowledges receipt of nVidia's Motion to Strike Improper Material in Plaintiff Carlyle Fortran Trust's Fourth Amended Complaint. (See Docket Item No. 147, hereafter, "Motion to Strike"). nVidia contends that the Court should strike portions of the FAC that it characterizes as a "back-door effort to request reconsideration [of the Court's Order dismissing Carlyle's Third Amended Complaint.]" (Motion to Strike at 2.) In light of this Order, nVidia's Motion is denied as moot.

V. CONCLUSION

The Court GRANTS Defendants' Motions to Dismiss Carlyle's Fourth Amended Complaint. The Court finds that there are no circumstances under which Carlyle may state a claim for a particularized injury. Accordingly, the dismissal is with prejudice.

Dated: December 15, 2006

/s/ James Ware
JAMES WARE
United States
District Judge

**THIS IS TO CERTIFY THAT COPIES OF THIS
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Dated: December 15, 2006

Richard W. Wieking, Clerk

By: /s/ JW Chambers

Elizabeth Garcia

Courtroom Deputy

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CARRAMERICA REALTY
CORPORATION; et al.,

Plaintiffs-Appellants,

and

CARLYLE FORTTRAN TRUST,

Plaintiff,

v.

NVIDIA CORPORATION; et al.,

Defendants-Appellees

3DFX INTERACTIVE, Inc.,

Debtor-in-Possession-
Appellee,

WILLIAM A. BRANDT, Jr.,

Trustee-Appellee.

CARLYLE FORTTRAN TRUST,

Plaintiff-Appellant,

v.

NVIDIA CORPORATION;
NVIDIA US INVESTMENT
COMPANY; JEN-HSUAN
HUANG; JAMES C. GAITHER;
A. BROOKE SEAWELL;
WILLIAM J. MILLER;

Nos. 06-17109

D.C. No.

CV-05-00428-JW

ORDER AMENDING
MEMORANDUM

(Filed Jan. 22, 2009)

No. 07-15077

D.C. No.

CV-05-00427-JW

TENCH COXE; MARK A.
STEVENS; HARVEY C.
JONES; CHRISTINE
HOBERG; STEPHEN
PETTIGREW; JAMES
HOPKINS; JAMES WHIMS;
GORDON A. CAMPBELL;
RICHARD A. HEDDLESON;
ALEX LEUPP; SCOTT D.
SELLERS,

Defendants-Appellees.

Before: FARRIS, SILER,* and BEA, Circuit Judges.

The memorandum disposition filed November 25, 2008, is hereby amended as follows:

memorandum at 7, Replace “interference with
line 15 contractual relations and
fraud claims” with “interfer-
ence with contractual rela-
tions, fraud, conspiracy, and
tort of another claims”

memorandum at 8 Insert the following new
paragraph after “Carr-
America has standing to
assert these claims.”:

On remand, the district
court is instructed to de-
termine which of Carlyle’s

* The Honorable Eugene E. Siler, Jr., Senior United States
Circuit Judge for the Sixth Circuit, sitting by designation.

claims have been abandoned by the bankruptcy trustee, thus conferring standing on Carlyle to pursue these claims. *See Estate of Spiritos*, 443 F.3d at 1175.

memorandum at 8 Replace "Costs to be paid by Defendants-Appellees" with the following text:

Costs in appeal no. 06-17109 to be paid by Defendants-Appellees NVIDIA Corp., NVIDIA US Investment Co. No. 2, Jen-Hsuan Huang, James C. Gaither, A. Brooke Seawell, William J. Miller, Tench Cox, Mark A. Stevens, and Harvey C. Jones; costs in appeal no. 07-15077 to be paid by Plaintiff-Appellant Carlyle Fortran Trust.

The full court has been advised of the petition for an en banc rehearing and no judge of the court has requested a vote on the petition for rehearing en banc. Fed. R. App. P. 35(b). Therefore, the petition for rehearing en banc is denied. No future petitions for rehearing shall be entertained.

11 U.S.C. § 502. Allowance of claims or interests

* * *

(b) Except as provided in subsections (e)(2), (f), (g), (h) and (i) of this section, if such objection to a claim is made, the court, after notice and a hearing, shall determine the amount of such claim in lawful currency of the United States as of the date of the filing of the petition, and shall allow such claim in such amount, except to the extent that –

(1) such claim is unenforceable against the debtor and property of the debtor, under any agreement or applicable law for a reason other than because such claim is contingent or unmatured;

(2) such claim is for unmatured interest;

(3) if such claim is for a tax assessed against property of the estate, such claim exceeds the value of the interest of the estate in such property;

(4) if such claim is for services of an insider or attorney of the debtor, such claim exceeds the reasonable value of such services;

(5) such claim is for a debt that is unmatured on the date of the filing of the petition and that is excepted from discharge under section 523(a)(5) of this title;

(6) if such claim is the claim of a lessor for damages resulting from the termination of a lease of real property, such claim exceeds –

App. 39

(A) the rent reserved by such lease, without acceleration, for the greater of one year, or 15 percent, not to exceed three years, of the remaining term of such lease, following the earlier of –

(i) the date of the filing of the petition; and

(ii) the date on which such lessor repossessed, or the lessee surrendered, the leased property; plus

(B) any unpaid rent due under such lease, without acceleration, on the earlier of such dates;

(7) if such claim is the claim of an employee for damages resulting from the termination of an employment contract, such claim exceeds –

(A) the compensation provided by such contract, without acceleration, for one year following the earlier of –

(i) the date of the filing of the petition; or

(ii) the date on which the employer directed the employee to terminate, or such employee terminated, performance under such contract; plus

(B) any unpaid compensation due under such contract, without acceleration, on the earlier of such dates;

(8) such claim results from a reduction, due to late payment, in the amount of an otherwise

applicable credit available to the debtor in connection with an employment tax on wages, salaries, or commissions earned from the debtor; or

(9) proof of such claim is not timely filed, except to the extent tardily filed as permitted under paragraph (1), (2), or (3) of section 726(a) of this title or under the Federal Rules of Bankruptcy Procedure, except that a claim of a governmental unit shall be timely filed if it is filed before 180 days after the date of the order for relief or such later time as the Federal Rules of Bankruptcy Procedure may provide, and except that in a case under chapter 13, a claim of a governmental unit for a tax with respect to a return filed under section 1308 shall be timely if the claim is filed on or before the date that is 60 days after the date on which such return was filed as required.

* * *

11 U.S.C. § 524. Effect of discharge

(a) A discharge in a case under this title –

(1) voids any judgment at any time obtained, to the extent that such judgment is a determination of the personal liability of the debtor with respect to any debt discharged under section 727, 944, 1141, 1228, or 1328 of this title, whether or not discharge of such debt is waived;

(2) operates as an injunction against the commencement or continuation of an action, the

employment of process, or an act, to collect, recover or offset any such debt as a personal liability of the debtor, whether or not discharge of such debt is waived; and

(3) operates as an injunction against the commencement or continuation of an action, the employment of process, or an act, to collect or recover from, or offset against, property of the debtor of the kind specified in section 541(a)(2) of this title that is acquired after the commencement of the case, on account of any allowable community claim, except a community claim that is excepted from discharge under section 523, 1228(a)(1), or 1328(a)(1), or that would be so excepted, determined in accordance with the provisions of sections 523(c) and 523(d) of this title, in a case concerning the debtor's spouse commenced on the date of the filing of the petition in the case concerning the debtor, whether or not discharge of the debt based on such community claim is waived.

* * *

(e) Except as provided in subsection (a)(3) of this section, discharge of a debt of the debtor does not affect the liability of any other entity on, or the property of any other entity for, such debt.

* * *

Cal. Civ. Code §1624. Statute of frauds

(a) The following contracts are invalid, unless they, or some note or memorandum thereof, are in writing and subscribed by the party to be charged or by the party's agent:

(1) An agreement that by its terms is not to be performed within a year from the making thereof.

(2) A special promise to answer for the debt, default, or miscarriage of another, except in the cases provided for in Section 2794.

(3) An agreement for the leasing for a longer period than one year, or for the sale of real property, or of an interest therein; such an agreement, if made by an agent of the party sought to be charged, is invalid, unless the authority of the agent is in writing, subscribed by the party sought to be charged.

(4) An agreement authorizing or employing an agent, broker, or any other person to purchase or sell real estate, or to lease real estate for a longer period than one year, or to procure, introduce, or find a purchaser or seller of real estate or a lessee or lessor of real estate where the lease is for a longer period than one year, for compensation or a commission.

(5) An agreement that by its terms is not to be performed during the lifetime of the promisor.

(6) An agreement by a purchaser of real property to pay an indebtedness secured by a mortgage or deed of trust upon the property

purchased, unless assumption of the indebtedness by the purchaser is specifically provided for in the conveyance of the property.

(7) A contract, promise, undertaking, or commitment to loan money or to grant or extend credit, in an amount greater than one hundred thousand dollars (\$100,000), not primarily for personal, family, or household purposes, made by a person engaged in the business of lending or arranging for the lending of money or extending credit. For purposes of this section, a contract, promise, undertaking or commitment to loan money secured solely by residential property consisting of one to four dwelling units shall be deemed to be for personal, family, or household purposes.

* * *

Cal. Civ. Code §1633.4. Further application of title

This title applies to any electronic record or electronic signature created, generated, sent, communicated, received, or stored on or after January 1, 2000.

Cal. Civ. Code §1633.7. Legal effect or enforceability of electronic record, signature, or contract

(a) A record or signature may not be denied legal effect or enforceability solely because it is in electronic form.

(b) A contract may not be denied legal effect or enforceability solely because an electronic record was used in its formation.

(c) If a law requires a record to be in writing, an electronic record satisfies the law.

(d) If a law requires a signature, an electronic signature satisfies the law.

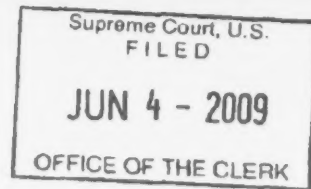
Cal. Civ. Code §1633.9. Attribution of electronic record or signature

(a) An electronic record or electronic signature is attributable to a person if it was the act of the person. The act of the person may be shown in any manner, including a showing of the efficacy of any security procedure applied to determine the person to which the electronic record or electronic signature was attributable.

(b) The effect of an electronic record or electronic signature attributed to a person under subdivision (a) is determined from the context and surrounding circumstances at the time of its creation, execution, or adoption, including the parties' agreement, if any, and otherwise as provided by law.

3

No. 08-1232



In the Supreme Court of the United States

CARLYLE FORTTRAN TRUST,

Petitioner,

v.

NVIDIA CORPORATION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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SUMMARY

Respondents Gordon Campbell, James Whims, James Hopkins, Scott Sellers and Alex Leupp are former directors or officers of 3dfx Interactive, Inc. ("3dfx"), a publicly traded California corporation that filed for bankruptcy in October of 2002, slightly less than two years after entering into an agreement to sell the majority of its assets to a former competitor, nVidia Corporation ("nVidia"). Separate counsel represents Mr. Richard Heddleson, who was also a former officer of 3dfx. However, in the proceedings below, all of the former directors and officers of 3dfx – Gordon Campbell, James Whims, James Hopkins, Scott Sellers, Alex Leupp and Richard Heddleson – were referred to collectively; accordingly, in this brief in opposition, they are all also collectively referred to as the "3dfx D&Os."

Respondents submit this brief in opposition to fulfill their obligation under Supreme Court Rule 15 to point out any perceived misstatements of fact or law contained in the petition.

The petition misstates the law in its contention that there are intra-circuit and inter-circuit conflicts on the issue of whether a bankruptcy trustee has standing to pursue redress for actions that in the first instance injured a debtor corporation, but that derivatively caused injury to the corporation's creditors. The decisions are unanimous in agreeing that the trustee has standing. The decisions merely differ in the words they use to

describe the realm of lawsuits that a bankruptcy trustee is authorized to pursue.

These respondents also believe that the petition's recitation of the facts and proceedings below is misleading, because the petition improperly omits any mention of the most important and legally dispositive event for these respondents: the 3dfx D&Os entered into a settlement with the bankruptcy trustee.

Indeed, the 3dfx D&Os agreed to pay \$5.5 million to the 3dfx bankruptcy estate in order to buy peace and end the litigation against them. They submitted their settlement agreement to the bankruptcy court for approval, and they provided notice to all of 3dfx's creditors, including petitioner, with the full opportunity for petitioner to voice any objection to the trustee's jurisdiction or authority to enter into the proposed agreement. When no objections were voiced, and after the settlement had been approved by the bankruptcy court and the time for any appeal had expired, these respondents paid the \$5.5 million settlement sum to the bankruptcy trustee and, in return, received a full release of all claims against them, including the precise claims that petitioner now seeks to resurrect and reassert.

This brief in opposition thus first provides a Statement of the Case that includes the additional facts that petitioner chose to ignore. It then addresses the first of the four questions presented in the petition, since it is only that single question that even conceivably could impact the Ninth Circuit's

ruling, in an unpublished opinion, that the trial court properly dismissed petitioner's claims against the 3dfx D&Os.

The other three questions raised in the petition deal with claims and issues against other parties, and do not involve the 3dfx D&Os. Respondents accordingly defer to the other parties to adequately address those topics in their briefs to this Court.

The one item that could conceivably impact these respondents – the first of the four questions identified in the petition – is the question whether there exist intra-circuit or inter-circuit conflicts regarding the proper application of this Court's decision in *Caplin v. Marine Midland Grace Trust Co. of New York*, 406 U.S. 416 (1972) to situations where a debtor corporation has suffered an injury that also derivatively has harmed its creditors. As this brief demonstrates, the purported conflicts do not exist.

The test for determining when a trustee is suing on behalf of a bankruptcy estate (as opposed to suing on behalf of creditors) is clear: if a trustee seeks to recover for harm or for the dissipation of assets that in the first instance impacted the bankrupt company, then he is properly suing on behalf of the bankruptcy estate. This is true even if the same harm was also felt by creditors, or if the same transactions had a ripple effect that left the bankrupt company with insufficient funds to pay some creditors.

Admittedly, the words used to describe the test have changed in the last decade. But the substance has always been the same. And it is only by taking words from various decisions out of context and without reference to the overall framework that petitioner is able to pretend that any conflict exists.

Petitioner's most prominent error is to focus solely on the word "general" used by the Ninth Circuit Bankruptcy Appellate Panel to distinguish between a particularized injury caused to an individual creditor (for which the Trustee cannot seek redress) and a "general" injury that impacts *all* creditors (for which the Trustee may properly seek redress.) Petitioner improperly conflates this use of the word "general" with the phrase "general cause of action" that has been used in other decisions to distinguish between a creditor's regular cause of action and a creditor's derivative claim.

As a closer look at the case law demonstrates, the various decisions are not truly inconsistent, and in using the word "general" were not addressing the same thing. Because the cases that petitioner relies upon to demonstrate inter-circuit and intra-circuit conflicts do not actually conflict with each other, there is no reason for this Court to grant the petition.

Petitioner has not, and cannot, make the showing required for the grant of review on certiorari by Supreme Court Rule 10. The petition should accordingly be denied.

STATEMENT OF THE CASE

In the summer of 2000, the 3dfx D&Os faced a crisis: their company was imploding and hemorrhaging cash at a rate that could only last a few months at most. Faced with few alternatives, the 3dfx D&Os agreed to sell 3dfx's assets to nVidia, another Silicon Valley company, for a combination of \$70 million in cash and 1 million shares of nVidia stock. The deal included a caveat: nVidia would only transfer the million shares of stock if 3dfx was first successfully able to retire its debts and dissolve.

3dfx was *not* successful in retiring its debts, however, and ceased paying rent to petitioner, its landlord, in January of 2002. On May 10, 2002, petitioner filed a lawsuit based upon its rent loss in the Superior Court of the State of California in and for the County of Santa Clara. That complaint included claims against 3dfx, nVidia and the directors and officers of nVidia. Contrary to petitioner's recitation of facts in its petitioning Statement of the Case, that complaint did *not* include any claims against the 3dfx D&Os.

On October 15, 2002, 3dfx filed a Chapter 11 bankruptcy petition. Despite the constraints imposed by the automatic bankruptcy stay, on December 20, 2002 petitioner filed an amended complaint in the Santa Clara Superior Court against 3dfx, nVidia, the nVidia directors and officers and also the 3dfx D&Os.

Two weeks later, on January 3, 2003, nVidia removed the Santa Clara Superior Court action to the bankruptcy court.

On September 17, 2003, the bankruptcy trustee filed a complaint against the 3dfx D&Os in the Superior Court of the State of California in and for the County of San Mateo. The trustee's lawsuit complained about the structure of the nVidia transaction and (just like petitioner) asserted that in agreeing to the deal, the 3dfx D&Os had (among other things) breached their fiduciary duties.

After a year of intense litigation, in September of 2004, the 3dfx D&Os reached a settlement with the trustee, agreeing to pay \$5.5 million in exchange for a complete release of all claims that had been or could have been asserted against them.

That settlement was submitted to the bankruptcy court, and due notice of the settlement terms were provided to all of 3dfx's creditors, including petitioner. Neither petitioner, nor any other creditor, objected to the proposed settlement, and on November 19, 2004, the settlement was duly approved by the bankruptcy court.

After the period for any appeal from the approval order had expired, the 3dfx D&Os paid \$5.5 million to the bankruptcy estate and, in exchange, the bankruptcy trustee provided to the 3dfx D&Os a full and complete release of all possible claims against them, expressly including "any liability by

Defendants for allegedly participating in the transfer of assets or sale or merger to/with Nvidia Corporation, whether as a fraudulent conveyance or otherwise."

On December 13, 2004, the bankruptcy trustee also filed a dismissal with prejudice of his complaint against the 3dfx D&Os.

Relying upon the dismissal and the full release provided by the bankruptcy trustee, the 3dfx D&Os then moved to dismiss the claims asserted by petitioner against them. On December 15, 2006, the 3dfx D&Os' motion to dismiss was granted without leave to amend.

That dismissal order was affirmed by the Ninth Circuit on November 25, 2008.

ARGUMENT

I. THE INTRA-CIRCUIT AND INTER-CIRCUIT CONFLICTS THAT PETITIONER ASSERTS DO NOT ACTUALLY EXIST

In *Caplin v. Marine Midland Grace Trust Co. of New York*, 406 U.S. 416 (1972), this Court first addressed the question of whether a bankruptcy trustee had standing to file a lawsuit on behalf of a debtor corporation's bond holders against a third party indenture trustee whose misconduct contributed to the losses sustained by those creditors. This Court concluded that a bankruptcy trustee does not have that standing.

The Court's analysis recognized the long-standing rule that a bankruptcy trustee has the authority to pursue any cause of action that the debtor corporation (Webb & Knapp) could have asserted prior to filing for bankruptcy. *Caplin*, 406 U.S. at 429. The Court's decision then noted that while Congress had recently enacted legislation that allowed bondholders themselves to sue a negligent indenture trustee, there was no such remedy available to the debtor corporation itself. The Court observed:

If petitioner could sue on behalf of Webb & Knapp, the statute that requires that he report possible causes of action to the court would require mention of this cause of action.

Moreover, petitioner has brought every conceivable claim that is available to him as trustee. Not only has he brought this action against the indenture trustee, but he has also sued former officers of Webb & Knapp charging them with waste. [Record Citation.] Certain settlements have apparently been made in some of these actions.

Caplin, 406 U.S. at 429, fn. 20, emphasis added.

Petitioner claims that there is a split of authority on whether *Caplin* is properly interpreted to prevent a bankruptcy trustee from suing various parties, like the respondents on this petition. But as the issue relates to the 3dfx D&Os, there cannot possibly be any confusion. For on its face, this Court's decision in *Caplin* recognized the authority of a bankruptcy trustee to sue and settle with the directors and officers of a debtor corporation.

At a minimum, petitioner has framed its petition too broadly. Indeed, petitioner has neither now nor ever cited a single decision that barred a bankruptcy trustee from suing and settling with the directors and officers of a debtor corporation.

Moreover, even apart from petitioner's error in casting its petition too widely, so that it encompasses the 3dfx D&Os for whom the *Caplin* decision cannot provide any legitimate confusion, petitioner also errs in seeing conflicts within and between the circuit

courts of appeals. For the conflicts that petitioner posits are based solely upon the use by different courts of different words to describe the same principles.

All of these decisions seek to differentiate between a debtor company's causes of action, which the bankruptcy trustee may properly pursue even though doing so will ultimately benefit creditors, from a creditor's individual cause of action, which the Trustee is barred under *Caplin* from pursuing.

That was the task that the court in *CBS, Inc. v. Folks (In re Folks)*, 211 B.R. 378 (B.A.P. 9th Cir. 1997) directly confronted in differentiating between what it called "general" (company) claims and personal (creditor) claims:

A cause of action is "personal" if the claimant himself is harmed and no other claimant or creditor has an interest in the cause. *Citation*. A general claim exists "[i]f the liability is to all creditors of the corporation without regard to the personal dealings between such officers and such creditors." *Citation*. "If a claim is a general one, with no particularized injury arising from it, and if that claim could be brought by any creditor of the debtor, the trustee is the proper person to assert the claim, and the creditors

are bound by the outcome of the trustee's action."

In re Folks, 211 B.R. at 387.

Latching onto the *Folks* court's distinction between "general" and "personal" claims, petitioner asserts that *Folks* conflicts with *Williams v. California First Bank*, 859 F.2d 664 (9th Cir. 1988). But petitioner misreads *Williams* and improperly focuses upon the decision's use of the word "general" without understanding the context of that usage.

Williams involved a Ponzi scheme used by a seafood distributor to fund its business. The distributor sold investment contracts guaranteeing a high rate of return (10% per month), and then paid the returns by selling more investment contracts. Ultimately, of course, the pyramid collapsed, and the seafood distributor filed for bankruptcy protection.

Many of those who had purchased investment contracts that had not been repaid banded together to pursue California First Bank. The bank had been the depository for the funds raised by the fraudulent investment contracts, and the bank was arguably complicit in the seafood distributor's fraud. The creditors who had banded together assigned their causes of action against California First Bank to the bankruptcy trustee, who then endeavored to sue on behalf of the creditors as their assignee. This was, the Ninth Circuit held, barred by *Caplin*. And in discussing *Caplin*, the Ninth Circuit noted that a

trustee lacks the authority to assert "general causes of action" on behalf of creditors. *Williams*, 859 F.2d at 667.

Petitioner pretends that the *Williams* decision is inconsistent with *Folks*, and that the phrase "general causes of action" used by the *Williams* court is the same thing as a "general claim, with no particularized injury arising from it" – the phrase used in *Folks*. But petitioner is plainly wrong; and the *Folks* test would have led to the precise same result.

For the creditors in *Williams* who had purchased investment contracts were the *only* ones who were injured by the bank's failure to blow the whistle on the fraudulent Ponzi scheme. Every other creditor who dealt with the seafood distributor *benefited* from the Ponzi scheme, for the numerous investment contracts raised the operating capital that the distributor used to pay its bills. Applying the *Folks* test, one would characterize the claims of those who had purchased investment contracts as personal claims based upon each contract holder's particularized injury. For the assertion that California First Bank was complicit in the seafood distributor's Ponzi scheme was clearly not a "claim that could be brought by *any* creditor of the debtor." *Folks*, 211 B.R. at 387. It was, instead, only a claim that could be brought by those who had purchased the fraudulent investment contracts.

Indeed, it is a recognized truism that an injury to an insolvent corporation is felt by *all* of the

company's creditors. *Smith v. Arthur Andersen*, 421 F.3d 989, 1004 (9th Cir. 2005). And by recognizing this truism, one sees that the *Folks* standard and the *Williams* standard are, at bottom, one and the same: when a party's acts or omissions harm a corporation or dissipate its assets, then the "claim is a general one, with no particularized injury arising from it . . . that could be brought by any creditor of the debtor." *Folks*, 211 B.R. at 387.

This was, indeed, explained by the Seventh Circuit in *Steinberg v. Buczynski*, 40 F.3d 890 (7th Cir. 1994). Contrary to petitioner's assertions, the *Steinberg* decision also does not present any intra or inter-circuit conflicts, but rather demonstrates that the "conflict" that petitioner relies upon is actually merely an evolution in the legal terminology that is most helpful in understanding and following *Caplin*.

The point is simply that the trustee is confined to enforcing entitlements of the corporation. He has no right to enforce entitlements of a creditor. He represents the unsecured creditors of the corporation; and in that sense when he is suing on behalf of the corporation he is really suing on behalf of the creditors of the corporation. But there is a difference between a creditor's interest in the claims of the corporation against a third party, which are enforced by the trustee, and the creditor's own direct - *not derivative* -

claim against the third party, which only the creditor himself can enforce.

Steinberg, 40 F.3d at 893, emphasis added.

With its focus on derivative and non-derivative claims, the *Steinberg* decision highlights petitioner's error. As *Steinberg* notes, *Caplin* prevents a trustee from asserting a creditor's *non-derivative* claims. Derivative claims, in contrast, arise from an injury, in the first instance, to the debtor corporation itself. Accordingly, even though that injury will inevitably be felt by the creditors, any causes of action arising from such an injury are owned by the debtor corporation, and are thus properly redressed by the trustee, not individual creditors.

At the level of *substance*, all of the cases agree that the bankruptcy trustee has standing under *Caplin* to pursue derivative claims – that is, claims arising from an injury caused in the first instance to the debtor corporation. *Folks* characterizes such derivative claims as being “generalized” or “general” ones, since a derivative claim harms all creditors. *Williams*, in contrast, uses the same word “general” to refer to a creditor's individual *non-derivative* causes of action.

But even at the level of semantics, the circuit courts are converging, not diverging. For as part of its decision in *Steinberg*, the Seventh Circuit criticized its earlier attempt to distinguish between “particularized injuries” and “general claims” as being unhelpful, and it thus shifted the focus to

whether or not a cause of action arises, in the first instance, because of an injury to or dissipation of assets from a corporation.

The Seventh Circuit has thus moved beyond its earlier use of the term "general" as a reference to derivative claims that impact all creditors. And the Ninth Circuit has followed suit as well, confirming the long established rule that a bankruptcy trustee has standing to assert derivative causes of action, but like *Steinberg*, shifting the focus of the inquiry to the source of the injury from which a cause of action arises:

Although creditors may attain standing to assert fiduciary duty claims upon a firm's insolvency as a matter of state corporate law, it does not follow that a trustee, who represents the debtor, lacks standing to assert such claims as a matter of federal bankruptcy law. Again, the ultimate question in determining whether a trustee has standing is whether the debtor corporation has been injured.

Smith, 421 F.3d at 1005.

Even the semantic conflicts that petitioner has tried to exploit are dwindling. And because no substantive conflict exists, there are no valid grounds for issuance of a writ of certiorari.

II. THE REMAINING QUESTIONS PRESENTED IN THE PETITION DO NOT IMPACT THE 3DFX D&Os

In seeking review from this Court, petitioner presents three additional questions. None of the three questions impact the 3dfx D&Os.

A. Question 2 of 4 Does Not Apply

As its second question, the petition asks: "Was the Ninth Circuit correct in declining to follow the Second Circuit's *Wagoner* rule?"

Petitioner defines the *Wagoner* rule as stating that "when a bankrupt corporation has joined with a **third party in defrauding its creditors**, the trustee cannot recover against the third party . . ." *Shearson Lehman Hutton, Inc. v. Wagoner*, 944 F.2d 114, 118 (2d Cir. 1991), emphasis added. The directors and officers of a bankrupt corporation, however, cannot be considered "third parties" since a corporation can only act through its officers and directors.

Indeed, the petition itself only presents the *Wagoner* rule as a bar to the trustee's ability to sue nVidia and nVidia's directors and officers. *Petition* at 24.

B. Question 3 of 4 Does Not Apply

As its third question, the petition asks: "As between a Chapter 11 reorganization trustee and a creditor of the estate, does the creditor (landlord) have standing to pursue interference claims against a third part for causing the debtor in bankruptcy (tenant) to breach the lease?"

Again, by its terms this question only relates to claims asserted against "third parties" – a term that does not include the 3dfx D&Os. Indeed, it is hornbook law that the directors and officers of a corporation cannot interfere with the corporation's own contracts. *Marin v. Jacuzzi*, 224 Cal.App.2d 549, 553-554 (Cal. 1964); *Crosstalk Productions v. Jacobson*, 65 Cal.App.4th 631, 646 (Cal. 1998).

Accordingly, as to the 3dfx D&Os, the clear answer to petitioner's question is that *nobody* has standing to pursue claims for any interference with 3dfx's lease.

C. Question 4 of 4 Does Not Apply

As its fourth question, the petition asks: "If a purchase and sale agreement provides that the buyer is purchasing certain assets listed in an exhibit to the agreement, is the buyer's signature on the agreement alone sufficient to satisfy the statute of frauds (rather than requiring the buyer to sign the exhibit as well)?"

The 3dfx D&Os were not parties to the asset purchase agreement. That was an agreement between nVidia and 3dfx. The last question presented by petitioner thus also does not apply to these respondents.

Because these respondents have nothing more than an academic interest in the resolution of the three final questions posed by the petition, they believe the issues raised by those questions are better left to the other respondents to address.

CONCLUSION

For the foregoing reasons, these respondents request that the petition submitted by Carlyle Fortran Trust seeking the issuance by this Court of a writ of certiorari to the United States Court of Appeals for the Ninth Circuit be denied.

Respectfully submitted,

Douglas A. Applegate

Counsel of Record

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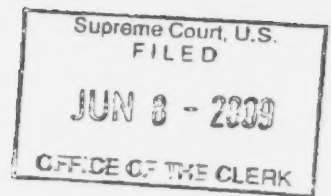
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No. 08-1232

In the Supreme Court of the United States

CARLYLE FORTTRAN TRUST,

Petitioner,

v.

NVIDIA CORPORATION, et al.,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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SUMMARY

Respondent Richard Heddleson ("Heddleson") is the former chief financial officer of 3dfx Interactive, Inc. ("3dfx"), a publicly traded California corporation. In October of 2002, 3dfx filed for bankruptcy, approximately two years after entering into an agreement to sell the majority of its assets to a former competitor, nVidia Corporation ("nVidia").

This respondent submits this brief in opposition primarily to fulfill his obligation under Supreme Court Rule 15 to identify any perceived misstatements of fact or law contained in the petition. In this regard, this brief reiterates many of the arguments proffered by respondents Gordon Campbell, James Whims, James Hopkins, Sellers and Alex Leupp ("3dfx D&Os") in their brief in opposition.

The petition's recitation of the facts and proceedings below is misleading. Most critically, the petition improperly omits any reference to the settlement between 3dfx D&Os and the bankruptcy trustee. Indeed, the 3dfx D&Os agreed to pay \$5.5 million to the 3dfx bankruptcy estate in a court approved settlement in order to buy peace and end the litigation against them. More specifically, as a result of the settlement the 3dfx D&Os, including Heddleson, received a full release of all claims against them, including the claims that petitioner now seeks to resurrect and reassert.

The petition presents four questions, only one of which has any bearing on petitioner's claims against the 3dfx D&Os: whether there exists an intra-circuit or inter-circuit conflict regarding the proper application of this Court's decision in *Caplin v. Marine Midland Grace Trust Co. of New York*, 406 U.S. 416 (1972).

In this regard, the petition erroneously contends that intra-circuit and inter-circuit conflicts exist concerning a bankruptcy trustee's standing to pursue redress for actions that in the first instance injured a debtor corporation, but that derivatively caused injury to the corporation's creditors. In reality, the decisions are unanimous in holding that the trustee has such standing.

The test for determining when a trustee is suing on behalf of a bankruptcy estate (as opposed to suing on behalf of creditors) is clear: if a trustee seeks to recover for harm or for the dissipation of assets that in the first instance impacted the bankrupt company, then the trustee may properly sue on behalf of the bankruptcy estate. This is true even if the same harm was also felt by creditors, or if the same transactions had a ripple effect that left the bankrupt company with insufficient funds to pay some creditors.

As a closer look at the case law demonstrates, the decisions of the courts, which have reviewed this issue, are not inconsistent. Because the cases that petitioner relies upon to demonstrate inter-circuit and intra-circuit conflicts do not actually conflict

with each other, no reason exists for this Court to grant the petition.

Petitioner has not, and cannot, make the showing required for the grant of review on *certiorari* pursuant to Supreme Court Rule 10. The petition should accordingly be denied.

STATEMENT OF THE CASE

In the summer of 2000, the 3dfx D&Os faced a crisis: their company was hemorrhaging cash at a rate that could only last a few months at most. Faced with few alternatives, 3dfx agreed to sell its 3dfx's assets to nVidia, another Silicon Valley company. Heddleson, 3dfx's chief financial officer, was not a board member, and, as such, did not vote on whether to approve the asset sale.

The 3dfx-nVidia transaction called for a combination of \$70 million in cash and 1 million shares of nVidia stock. The deal included a caveat: nVidia would only transfer the million shares of stock if 3dfx was first successfully able to retire its debts and dissolve.

3dfx was *not*, however, successful in retiring its debts. It ceased paying rent to petitioner, its landlord, in January of 2002. On May 10, 2002, petitioner filed a lawsuit based upon its rent loss in the Superior Court of the State of California in and for the County of Santa Clara. The complaint included claims against 3dfx, nVidia and the directors and officers of nVidia. Contrary to petitioner's recitation of facts in its Statement of the Case, the complaint did *not* include any claims against the 3dfx D&Os.

On October 15, 2002, 3dfx filed a Chapter 11 bankruptcy petition. Despite the constraints imposed by the automatic bankruptcy stay, on December 20, 2002, petitioner filed an amended

complaint in the Santa Clara Superior Court against 3dfx, nVidia, the nVidia directors and officers and also the 3dfx D&Os.

Two weeks later, on January 3, 2003, nVidia removed the Santa Clara Superior Court action to the bankruptcy court.

On September 17, 2003, the bankruptcy trustee filed a complaint against Heddleson and the 3dfx D&Os in the Superior Court of the State of California in and for the County of San Mateo. The trustee's lawsuit complained about the structure of the nVidia transaction and asserted that in agreeing to the deal, the 3dfx D&Os had (among other things) breached their fiduciary duties.

After a year of intense litigation, in September of 2004, the 3dfx D&Os reached a settlement with the trustee, agreeing to pay \$5.5 million in exchange for a full and complete release of all claims that had been or could have been asserted against them, including "any liability by Defendants for allegedly participating in the transfer of assets or sale or merger to/with Nvidia Corporation, whether as a fraudulent conveyance or otherwise."

The settlement was submitted to the bankruptcy court, with due notice of the settlement terms provided to all of 3dfx's creditors, including petitioner. Neither petitioner nor any other creditor objected to the proposed settlement. On November 19, 2004, the settlement was duly approved by the bankruptcy court. On December 13, 2004, the

bankruptcy trustee filed a dismissal with prejudice of his complaint against the 3dfx D&Os.

Following the dismissal and the full release provided by the bankruptcy trustee, the 3dfx D&Os then moved to dismiss the claims asserted by petitioner against them. On December 15, 2006, the 3dfx D&Os' motion to dismiss was granted without leave to amend.

The dismissal order was affirmed by the Ninth Circuit on November 25, 2008.

ARGUMENT

I. THE INTRA-CIRCUIT AND INTER-CIRCUIT CONFLICTS THAT PETITIONER ASSERTS DO NOT ACTUALLY EXIST

In *Caplin v. Marine Midland Grace Trust Co. of New York*, 406 U.S. 416 (1972), this Court first addressed the question of whether a bankruptcy trustee had standing to file a lawsuit on behalf of a debtor corporation's bond holders against a third party indenture trustee whose misconduct contributed to the losses sustained by those creditors. This Court concluded that a bankruptcy trustee does not have that standing.

The Court's analysis recognized the long-standing rule that a bankruptcy trustee has the authority to pursue any cause of action that the debtor corporation (Webb & Knapp) could have asserted prior to filing for bankruptcy. *Caplin*, 406 U.S. at 429. The Court's decision then noted that while Congress had recently enacted legislation that allowed bondholders themselves to sue a negligent indenture trustee, no such remedy was available to the debtor corporation itself. The Court observed:

If petitioner could sue on behalf of Webb & Knapp, the statute that requires that he report possible causes of action to the court would require mention of this cause of action. Moreover, petitioner has brought every

conceivable claim that is available to him as trustee. Not only has he brought this action against the indenture trustee, but he has also sued former officers of Webb & Knapp charging them with waste. [Record Citation.] Certain settlements have apparently been made in some of these actions.

Caplin, 406 U.S. at 429, fn. 20.

This Court's decision in *Caplin* recognized the authority of a bankruptcy trustee to sue and settle with the directors and officers of a debtor corporation. Yet petitioner posits that some courts have applied *Caplin* to prevent a bankruptcy trustee from suing various parties, including the respondents on this petition. In reality a bankruptcy trustee is not barred from suing and settling with the directors and officers of a debtor corporation.

Petitioner also errs in purportedly identifying conflicts within and between the circuit courts of appeals. No critical conflict exists. Rather, the pertinent decisions seek to differentiate between a debtor company's causes of action, which the bankruptcy trustee may properly pursue, and a creditor's individual cause of action, which the Trustee is barred under *Caplin* from pursuing.

CBS, Inc. v. Folks (In re Folks), 211 B.R. 378 (B.A.P. 9th Cir. 1997) explained the difference between what it labeled "general" (company) claims and "personal" (creditor) claims:

"A cause of action is 'personal' if the claimant himself is harmed and no other claimant or creditor has an interest in the cause." *Citation.* A general claim exists "if the liability is to all creditors of the corporation without regard to the personal dealings between such officers and such creditors." *Citation.* "If a claim is a general one, with no particularized injury arising from it, and if that claim could be brought by any creditor of the debtor, the trustee is the proper person to assert the claim, and the creditors are bound by the outcome of the trustee's action."

In re Folks, 211 B.R. at 387.

Petitioner erroneously asserts that *Folks* conflicts with *Williams v. California First Bank*, 859 F.2d 664 (9th Cir. 1988). *Williams* involved a Ponzi scheme used by a seafood distributor to fund its business. The distributor sold investment contracts guaranteeing a high rate of return (10% per month), and then paid the returns by selling more investment contracts. Ultimately, of course, the pyramid collapsed, and the seafood distributor filed for bankruptcy protection.

Many of those who had purchased investment contracts that had not been repaid banded together to pursue California First Bank. The bank had been

the depository for the funds raised by the fraudulent investment contracts, and the bank was arguably complicit in the seafood distributor's fraud. The creditors who had banded together assigned their causes of action against California First Bank to the bankruptcy Trustee, who then endeavored to sue on behalf of the creditors as their assignee. This was, the Ninth Circuit held, barred by *Caplin*. And in discussing *Caplin*, the Ninth Circuit noted that a trustee lacks the authority to assert "general causes of action" on behalf of creditors. *Williams*, 859 F.2d at 667.

Petitioner posits that the *Williams* decision is inconsistent with *Folks*, suggesting that the phrase "general causes of action" used by the *Williams* court is the same thing as a "general claim, with no particularized injury arising from it" – the phrase used in *Folks*. But petitioner is plainly wrong.

The creditors in *Williams* who had purchased investment contracts were the *only* ones who were injured by the bank's failure to blow the whistle on the fraudulent Ponzi scheme. Every other creditor who dealt with the seafood distributor *benefited* from the Ponzi scheme, because the numerous investment contracts raised the operating capital that the distributor used to pay its bills. Applying the *Folks* test, the claims of those who had purchased investment contracts would be deemed personal claims based upon each contract holder's particularized injury. The assertion that California First Bank was complicit in the seafood distributor's Ponzi scheme was clearly not a "claim that could be brought by *any* creditor of the debtor." *Folks*, 211

B.R. at 387. It was, instead, only a claim that could be brought by those who had purchased the fraudulent investment contracts.

The *Folks* and *Williams* standard is premised upon the common sense notion that an injury to an insolvent corporation is felt by *all* of the company's creditors. *Smith v. Arthur Andersen*, 421 F.3d 989, 1004 (9th Cir. 2005). Simply put, when a party's acts or omissions harm a corporation or dissipate its assets, then the "claim is a general one, with no particularized injury arising from it . . . that could be brought by any creditor of the debtor." *Folks*, 211 B.R. at 387.

This concept was further developed by the Seventh Circuit in *Steinberg v. Buczynski*, 40 F.3d 890 (7th Cir. 1994). Contrary to petitioner's assertions, the *Steinberg* decision also does not present any intra- or inter-circuit conflicts, but rather demonstrates that the "conflict" that petitioner relies upon is actually merely an evolution in the legal terminology that is most helpful in understanding and following *Caplin*.

The point is simply that the trustee is confined to enforcing entitlements of the corporation. He has no right to enforce entitlements of a creditor. He represents the unsecured creditors of the corporation; and in that sense when he is suing on behalf of the corporation he is really suing on behalf of the creditors of the corporation. But there

is a difference between a creditor's interest in the claims of the corporation against a third party, which are enforced by the trustee, and the creditor's own direct -- not derivative -- claim against the third party, which only the creditor himself can enforce.

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But even at the level of semantics, the circuit courts are converging, not diverging. As part of its decision in *Steinberg*, the Seventh Circuit criticized its earlier attempt to distinguish between

“particularized injuries” and “general claims” as unhelpful. It thus shifted the focus to discern whether a cause of action arises, in the first instance, due to an injury to or dissipation of assets from a corporation.

The Ninth Circuit has also moved beyond its earlier use of the term “general” as a reference to derivative claims that impact all creditors, confirming the long established rule that a bankruptcy trustee has standing to assert derivative causes of action:

Although creditors may attain standing to assert fiduciary duty claims upon a firm’s insolvency as a matter of state corporate law, it does not follow that a trustee, who represents the debtor, lacks standing to assert such claims as a matter of federal bankruptcy law. Again, the ultimate question in determining whether a trustee has standing is whether the debtor corporation has been injured.

Smith, 421 F.3d at 1005.

Because no conflict exists, no valid grounds exist for issuance of a writ of *certiorari*.

II. THE REMAINING QUESTIONS PRESENTED IN THE PETITION DO NOT IMPACT HEDDLESON

In seeking review from this Court, petitioner presents three additional questions. None of the three questions impacts Heddleson.

A. Question 2 of 4 Does Not Apply

As its second question, the petition asks: "Was the Ninth Circuit correct in declining to follow the Second Circuit's *Wagoner* rule?"

According to petitioner, the *Wagoner* rule provides: "when a bankrupt corporation has joined with a third party in defrauding its creditors, the trustee cannot recover against the third party . . ." *Shearson Lehman Hutton, Inc. v. Wagoner*, 944 F.2d 114, 118 (2d Cir. 1991). The directors and officers of a bankrupt corporation, however, cannot be considered "third parties" since a corporation can only act through its officers and directors.

Indeed, the petition itself only presents the *Wagoner* rule as a bar to the trustee's ability to sue nVidia and nVidia's directors and officers. *Petition* at 24.

B. Question 3 of 4 Does Not Apply

As its third question, the petition asks: "As between a Chapter 11 reorganization trustee and a creditor of the estate, does the creditor (landlord) have standing to pursue interference claims against a third party for causing the debtor in bankruptcy (tenant) to breach the lease?"

Again, by its terms this question only relates to claims asserted against "third parties" – a term that does not include the 3dfx D&Os, including Heddleson. Indeed, hornbook law acknowledges that the directors and officers of a corporation cannot interfere with the corporations' own contracts. *Marin v. Jacuzzi*, 224 Cal.App.2d 549, 553-554 (Cal. 1964); *Crosstalk Productions v. Jacobson*, 65 Cal.App.4th 631, 646 (Cal. 1998).

Accordingly, as to Heddleson, the clear answer to petitioner's question is that *nobody* has standing to pursue claims for any interference with 3dfx's lease.

C. Question 4 of 4 Does Not Apply

As its fourth question, the petition asks: "If a purchase and sale agreement provides that the buyer is purchasing certain assets listed in an exhibit to the agreement, is the buyer's signature on the agreement alone sufficient to satisfy the statute of frauds (rather than requiring the buyer to sign the exhibit as well)?"

Heddleson was not a party to the asset purchase agreement, an agreement between nVidia and 3dfx. The last question presented by petitioner thus also does not apply to this respondent.

CONCLUSION

For the aforementioned reasons, Heddleson requests that the petition submitted by Carlyle Fortran Trust seeking the issuance by this Court of a writ of *certiorari* to the United States Court of Appeals for the Ninth Circuit be denied.

Respectfully submitted,

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④

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QUESTIONS PRESENTED

Petitioner Carlyle Fortran Trust ("Carlyle") purports to present the following questions, though some are not legitimately presented by this case:

1. In *Caplin v. Marine Midland Grace Trust Co.*, 406 U.S. 416, 428 (1972), this Court held that a bankruptcy trustee does not have standing to assert claims "on behalf of debenture holders," a class of the creditors. Positing a split in the circuits on this point, Carlyle asks whether a trustee also lacks standing to press a claim that belongs to all creditors.

2. The Second Circuit's so-called "*Wagoner* rule," holds that, under New York law, a bankruptcy trustee lacks standing to pursue a claim against a defendant for defrauding the debtor corporation with the cooperation of the debtor's management. Was the Court of Appeals correct in declining to apply this standing rule?

3. The Bankruptcy Code caps claims by a debtor's landlord. Did the Ninth Circuit correctly hold that the mere existence of the statutory cap does not confer standing on a landlord to sue a party other than the debtor for the unpaid rent to the extent that the unpaid rent exceeds the statutory cap?

4. Carlyle claims that NVIDIA assumed a lease on which Carlyle was the landlord. In support of the claim, it attached to its complaint an unsigned facsimile of a redlined draft contract. It also presented an email that supposedly contradicts an integrated contract. Was the Court of Appeals

correct in applying California's statute of frauds to conclude that NVIDIA did not assume the lease?

CORPORATE DISCLOSURE STATEMENT

Respondent NVIDIA Corporation is a public company. No publicly held company owns 10% or more of its stock. Respondent NVIDIA US Investment Company is a wholly owned subsidiary of NVIDIA Corporation.

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INTRODUCTION

This bankruptcy appeal arises from an order dismissing Petitioner Carlyle Fortran Trust's complaint for lack of standing. Carlyle was the bankrupt debtor's landlord. In this suit, it does not seek to recover rent from the debtor. Rather, it blames third parties for the debtor's financial failure, and has sued them for the rent. Specifically, it alleges the defendants paid too little for the debtor's assets in a pre-bankruptcy asset purchase transaction, leaving the debtor unable to meet its financial obligations.

At bottom, this case is about who has standing to bring such a claim: May creditors sue third parties on such claims, or do the claims belong exclusively to the bankruptcy trustee? Under bankruptcy law, it must be one or the other; otherwise a creditor could beat the estate to a defendant and seek recoveries at the expense of the estate (and all the other creditors). The courts of appeals uniformly articulate the dividing line the Ninth Circuit applied in this case, that a bankruptcy trustee has exclusive standing to bring claims based on an underlying injury to the debtor, even though an injury to the debtor may also have ripple effects that derivatively harm creditors. App. 5-6.¹

Carlyle does not dispute that universal rule. It does not purport to present any question about who can bring claims *based on injuries to the debtor*.

¹ Petitioner's Appendix is cited herein as "App. __". The NVIDIA Respondents' Appendix is cited as "Resp. App. __".

Instead, it characterizes the central issue as revolving around who can bring claims *based on injuries inflicted directly on the creditors*. Acknowledging that the Supreme Court has held that a trustee may never bring claims on behalf of a *subset of creditors*, see *Caplin v. Marine Midland Grace Trust Co.*, 406 U.S. 416 (1972), Carlyle asks this Court to decide whether a trustee may nevertheless bring a “general” claim for harm inflicted on *all creditors*, regardless of the cause of that injury. But this case does not present the question—and the Court of Appeals did not decide it—because the Court of Appeals held that the claims in question *did not belong to the creditors*, but only to the debtor.

In its second question, Carlyle asks this Court to decide whether to adopt a standing rule articulated by the Second Circuit in *Shearson Lehman Hutton, Inc. v. Wagoner*, 944 F.2d 114, 118 (2d Cir. 1991). In essence, the “*Wagoner* rule” is that under New York law, a bankruptcy trustee lacks standing to sue a defendant for harm inflicted on the debtor, if a potential defense to that claim is *in pari delicto*,—that the defendant was in cahoots with the debtor’s management to cause the harm—so the debtor cannot seek to recover for its own wrongdoing. This question in substance is just a variant of the first question, and no more cert.-worthy. Moreover, because the *Wagoner* rule is a product of New York state law, and this case involves California law, uniformity is unimportant, and there is no reason for this Court to intervene. Finally, the *Wagoner* rule does not apply—and never has been applied—in the manner Carlyle advocates.

Carlyle also seeks review of an esoteric issue concerning the relationship between these standing doctrines and the cap that the Bankruptcy Code imposes on landlord claims in bankruptcy. Carlyle enthuses that this is "a question of first impression," Pet. 30, on which it could "not find any case law," whatsoever, Pet. 27, as if this were a selling point for Supreme Court review. Finally, Carlyle asks this Court to review a fact-bound application of California's statute of frauds. Neither assignment is consistent with this Court's customary role.

Carlyle's petition should be denied.

STATEMENT OF THE CASE

3dfx Interactive, Inc. ("3dfx"), was a technology company whose business began to falter in 1999. Throughout 2000, 3dfx was hemorrhaging cash, debt was piling up, and losses were accelerating. Eventually, 3dfx's management concluded the company could not sustain its existing operations. At its November, 2000 meeting, 3dfx's board of directors met with bankruptcy counsel to confront the sobering reality that 3dfx's cash would run out by mid-December 2000. It had to find a transaction that would enable the company to meet its financial obligations.

In consultation with its investment banker, the board concluded that the first choice was to recruit a merger partner. For all the board's gold-plated connections, however, no one in the market had any interest in acquiring, or merging with, 3dfx's broken business. Nor could 3dfx find an investor to infuse the struggling business with cash. The only viable

deal it found was with Respondents NVIDIA Corporation and NVIDIA US Investment Company (collectively, "NVIDIA"). NVIDIA agreed to purchase many of 3dfx's assets. In December, 2000, NVIDIA entered into an Asset Purchase Agreement, in which NVIDIA purchased those 3dfx assets for \$70 million in cash, plus a possible transfer of stock that was contingent on other events. This transaction was a giant step toward achieving the board's ultimate objective: After consideration of all other alternatives available to 3dfx, the board concluded that the liquidation, winding up and dissolution of 3dfx was the alternative most reasonably likely to enable 3dfx to pay its creditors and to maximize the return of value to its shareholders.

At the time of the transaction, 3dfx was renting office space from two landlords: Carlyle and CarrAmerica Realty Corporation ("CarrAmerica"). The Carlyle space was in California, and the CarrAmerica space in Texas. NVIDIA did not acquire those leases in the transaction.

The infusion of cash from NVIDIA forestalled the immediate financial crisis. But ultimately, it was not enough to help cover 3dfx's debts. More than a year after signing the Asset Purchase Agreement, 3dfx stopped paying rent to the two landlords. The landlords therefore decided to sue NVIDIA to make them whole.

In 2002, the two landlords filed suit in California state court against NVIDIA and some of its officers and directors (together with the individual defendants in the Carlyle complaint, the "NVIDIA

Respondents”) as well as 3dfx’s officers and directors. The landlords alleged that 3dfx could not make rent because NVIDIA had paid 3dfx too little for its assets a year earlier. If only NVIDIA had paid more, the landlords asserted, 3dfx would not have defaulted on its rent. Carlyle, the landlord whose claim is before the Court in this appeal, alleged, among other things, that by paying too little, NVIDIA tortiously interfered with the lease agreement, violated the Uniform Fraudulent Transfer Act, and was liable on the lease under theories of successor liability.

3dfx tried to effect a corporate dissolution under state law, but failed. In October, 2002, 3dfx filed a Chapter 11 bankruptcy petition in the Northern District of California. NVIDIA then removed both landlords’ cases to the bankruptcy court.

The trustee for 3dfx’s bankruptcy estate also sued NVIDIA, asserting fraudulent transfer and successor liability claims, just as the landlords had done. Like the landlords, the trustee complained that NVIDIA had paid too little for 3dfx’s assets. The bankruptcy court consolidated the three adversary proceedings for discovery, and they all proceeded in tandem for a while. After the close of discovery in 2005, for reasons not relevant here, the district court ordered the landlord lawsuits transferred from the bankruptcy court to the district court.

Upon arriving back in the district court, both landlords amended their complaints, prompting motions to dismiss. The District Court dismissed both amended complaints for lack of standing, with leave to amend. Resp. App. 1-16. The further

amendments were no better received; in late 2006, the district court dismissed both lawsuits with prejudice for lack of standing, painstakingly reviewing each claim and concluding that all alleged injury to the debtor in the first instance, and so belonged to the estate. App. 9-34; Resp. App. 17-37. The landlords appealed to the Ninth Circuit.

While the landlords' appeals were pending, the bankruptcy court tried the trustee's case against NVIDIA. The object of that trial was to determine the value of the assets that 3dfx had conveyed to NVIDIA in the Asset Purchase Agreement, so as to assess whether NVIDIA had paid "reasonably equivalent value" as required under controlling state law. The bankruptcy court issued an 87-page memorandum opinion finding that NVIDIA had paid more than twice the fair market value of the assets it purchased from 3dfx, and thus had caused the estate (and its creditors) no harm. *Brandt v. NVIDIA Corporation (In re 3dfx Interactive, Inc.)*, 389 B.R. 842, 887-88 (Bankr. N.D. Cal. 2008). The trustee's appeal to the district court is pending.

On review of the order dismissing the landlords' cases, the Court of Appeals reached a split decision. It affirmed the dismissal of Carlyle's complaint entirely. The Court of Appeals observed that the gravamen of Carlyle's complaint was that NVIDIA injured *the debtor* (3dfx) by dissipating the debtor's assets. App. 6. According to the court, all of Carlyle's alleged injuries flowed derivatively from the harm to the debtor, not harm that NVIDIA inflicted directly on Carlyle. App. 6. Under existing Ninth Circuit precedent, this meant that only *the trustee* had standing to recover, because the trustee

is exclusively responsible for pursuing claims involving injury to the debtor. See *Smith v. Arthur Anderson*, 21 F.3d 989, 1004 (9th Cir. 2005). A creditor whose injury derives only from harm to the debtor does not have standing to sue directly. That creditor must stand in line with all the other creditors and recover only its fair aliquot of the funds the trustee recovers from such claims.

The Court of Appeals reached a different conclusion as to some of CarrAmerica's claims. It held that CarrAmerica had pled certain direct injuries that were particular to CarrAmerica, and not derivative of any injury to 3dfx. App. 7-8. That meant that the trustee could not bring those claims, and CarrAmerica had standing to bring them directly against NVIDIA. App. 8. CarrAmerica has not sought review as to the claims that have been dismissed.

Carlyle filed a petition for rehearing *en banc* and a motion for clarification in the Court of Appeals. The court denied rehearing *en banc*, with not a single judge requesting a vote on Carlyle's petition. App. 37. However, in response to Carlyle's motion for clarification, the Court of Appeals remanded Carlyle's case to determine whether the trustee had abandoned the estate's property interest in any of the claims Carlyle had asserted against NVIDIA. App. 36-37. The bankruptcy court has since concluded that the trustee had not abandoned any of its claims. En route to that conclusion, the bankruptcy court chided Carlyle for securing the remand from the Court of Appeals through a "lack of candor" in its motion for clarification. See *In re 3dfx Interactive, Inc.*, No. 02-55795 RLE (Bankr. N.D.

Cal.) (Hearing held, May 13, 2009, Docket No. 1129; transcript at p. 49:4-11).

REASONS FOR DENYING THE PETITION

Carlyle presents four questions that it purports to find in the Court of Appeals' short, unpublished opinion. None of them is worthy of this Court's review.

The first is a question about whether a trustee has standing to assert claims that belong to all creditors. That question is not presented here, because the Court of Appeals held that the claims at issue do *not* belong to the creditors. And, in any event, the circuit conflict Carlyle describes is illusory. *See infra* Point I.

The second question is whether this Court should adopt a peculiar rule about trustee standing that no court other than the Second Circuit has ever adopted. The issue is not cert.-worthy because the Second Circuit rule is the product of New York state law, and California law (which governs here) is different. *See infra* Point II.

The remaining two questions are utterly unworthy of this Court's attention. Question 3 is a bankruptcy law question so esoteric that, according to Carlyle, no court other than the Ninth Circuit has ever addressed it. This Court should deny certiorari for that reason alone. *See infra* Point III.

Finally, Carlyle inexplicably asks this Court to decide a state law question about an application of the statute of frauds to a specific set of facts, the very antithesis of a cert.-worthy question. *See infra* Point IV.

I. THIS CASE DOES NOT PRESENT A CERT.-WORTHY CONFLICT ABOUT WHETHER TRUSTEES HAVE STANDING TO BRING "GENERAL" CLAIMS ON BEHALF OF ALL CREDITORS.

Carlyle purports to present this Court with an opportunity to resolve an asserted circuit conflict about whether a bankruptcy trustee has standing to bring claims on behalf of all creditors. Carlyle sees ambiguity in this Court's holding in *Caplin v. Marine Midland Grace Trust Co.*, that "nowhere in the statutory scheme is there any suggestion that the trustee in reorganization is to assume the responsibility of suing third parties on behalf of debenture holders," a class of creditors. 406 U.S. at 428. Carlyle presents the question "whether a bankruptcy trustee lacks standing to sue on behalf of creditors *generally* or only *a certain class* of creditors," such as debenture holders. Pet. 12 (emphasis added). The petition depicts two nearly equal camps aligning on either side of the question.

Carlyle is mistaken because: (A) this case does not present that question; and (B) the purported circuit conflict is illusory.

A. This Case Does Not Present the Issue Carlyle Purports to Present.

The conflict Carlyle seeks to present arises only in the specific context where a trustee "assume[s] the responsibility of suing third parties *on behalf of* creditors." *Caplin*, 406 U.S. at 428 (emphasis added). Only where the trustee is presenting claims that

actually *belong to* creditors does the debate arise over whether the trustee is ever allowed to do so, and, if so, under what circumstances. Only in that circumstance does a court confront the choice between: (1) a rule that the trustee has standing to bring claims on behalf of creditors, but only if the claims belong *generally* to *all* creditors; and (2) a rule that the trustee *never* has standing to press claims on behalf of creditors, even if the claims belong generally to all creditors.

This case does not present this Court with the opportunity to choose between these alternative rules, because the necessary precondition is missing. Contrary to Carlyle's assertion, the Court of Appeals did not "read *Caplin* broadly and for the proposition that a bankruptcy trustee cannot bring 'general' creditor claims." Pet. 12. The Court of Appeals did not interpret *Caplin*, and did not address the question whether a trustee can ever bring a claim *on behalf of* creditors. Rather, it held that the claims in question did not belong to creditors at all—not to all creditors generally and not to a subclass of creditors. The court could not have been clearer: "While the Creditors were harmed by the alleged diminution of 3dfx's estate, depleting the assets available for the bankruptcy estate *constitutes an injury to the bankrupt corporation itself, not an individual creditor of that corporation.*" App. 6 (emphasis added). In light of that conclusion, the Court of Appeals did not apply the *Caplin* rule, but a different rule entirely: "[T]he Trustee has exclusive standing to sue with respect to all claims asserted by Creditors based on an underlying injury to [the debtor]." App. 5-6.

Carlyle does not take issue with this rule. And for good reason. Whatever uncertainty there might be as to a trustee's power to bring claims that belong to *creditors*, every circuit to address the issue—at least ten in all—agrees that the trustee has exclusive authority to bring claims that belong to the *debtor*, and that a claim based on an injury to the debtor is a claim that belongs to the debtor, not to creditors.² Carlyle does not cite a single case that holds otherwise.

² See *Smith*, 421 F.3d at 1004 (trustee has exclusive standing where injury to creditors results from “the economic reality that any injury to an insolvent firm is necessarily felt by its creditors”); *Official Committee of Unsecured Creditors v. R.F. Lafferty & Co., Inc.*, 267 F.3d 340, 347-48 (3d Cir. 2001) (bankruptcy estate representative has standing where injury to creditors was not “separately cognizable” from injury to debtor); *Schimmelpennick v. Byrne (In re Schimmelpennick)*, 183 F.2d 347, 358-61 (5th Cir. 1999) (creditor has no standing to bring claims based on injury to debtor that affected creditor derivatively); *Bivens Gardens Office Bldg., Inc. v. Barnett Banks of Fla., Inc.*, 140 F.3d 898, 908 (11th Cir. 1998) (creditor lacks standing “if the injury alleged was suffered only as a result of harm to the corporation”); *Honigman v. Comerica Bank (In re van Dresser Corp.)*, 128 F.3d 945 (6th Cir. 1997) (creditor lacks standing because injury was derivative of harm to debtor corporation); *Steinberg v. Buczynski*, 40 F.3d 890, 893 (7th Cir. 1994) (a trustee enforces a creditor’s interest in claims where they are derivative of the debtor corporation’s claims); *Kalb, Voorhis & Co. v. Am. Fin. Corp.*, 8 F.3d 130, 132 (2d Cir. 1993) (“If a claim is a general one, with no particularized injury arising from it, and if that claim could be brought by any creditor of the debtor, the trustee is the proper person to assert the claim, and the creditors are bound by the outcome of the trustee’s action.”); *St. Paul Fire and Marine Ins. Co. v. PepsiCo Inc.*, 884 F.2d 688, 704 (2d Cir. 1989) (creditor lacked standing where its injury “alleged a secondary effect from harm done to”

This rule derives from the trustee's bedrock duty to collect the property of the estate and reduce it to money. See 11 U.S.C. § 704(1). As the Fifth Circuit has explained:

If a cause of action alleges only indirect harm to a creditor (i.e., an injury which derives from harm to the debtor), and the debtor could have raised a claim for its direct injury under the applicable law, then the cause of action belongs to the estate. (citations omitted) Conversely, if the cause of action does not explicitly or implicitly allege harm to the debtor, then the cause of action could not have been asserted by the debtor as of the commencement of the case, and thus is not property of the estate.

Schertz-Cibolo-Universal City, Indep. School Dist. v. Wright (In re Educators Group Health Trust), 25 F.3d 1281, 1284 (5th Cir. 1994).

Not only is this rule consistent with *Caplin*, but it is a necessary corollary to the *Caplin* rule. As the Third Circuit has explained:

the debtor); *Regan v. Vinick & Young (In re Rare Coin Galleries of Am., Inc.)*, 862 F.2d 896, 900-01 (1st Cir. 1988) (trustee has standing when alleging claims based on injury to debtor, even though wrongdoing caused debtor's customers to lose money); *Steyr-Daimler-Puch of Am. Corp. v. Pappas*, 852 F.2d 132, 136 (4th Cir. 1988) (creditor lacked standing to bring claim where injury is to debtor corporation under state law); *Delgado Oil Co., Inc. v. Torres*, 785 F.2d 857, 862 (10th Cir. 1986) (claim based on transferring assets from corporation states injury to corporation, and so belongs to trustee, not individual creditor).

Simply because the creditors of a[n] estate may be the primary or even the only beneficiary of such a recovery does not transform the action into a suit by the creditors. Otherwise, whenever a lawsuit constituted property of an estate which has insufficient funds to pay all creditors, the lawsuit would be worthless since under *Caplin* it could not be pursued by the trustee.

Lafferty, 267 F.3d at 348-49 (quotation and citation omitted).

To say that the courts universally agree on the baseline rule does not mean that the rule is always easy to apply. Sometimes seemingly inconsistent outcomes are attributable to the fact that state law dictates whether a claim belongs to the debtor or the creditor. See *Butner v. Unites States*, 440 U.S. 48, 54 (1979).³ Other times, different outcomes are attributable to subtle differences among the claims being assessed.⁴ Carlyle is incorrect in saying that

³ Compare, e.g., *Kalb*, 8 F.3d at 132 (alter ego claim belongs to corporation under Texas law, so claim was exclusive to trustee and creditor lacked standing), *St. Paul Fire*, 884 F.2d at 703-4 (same under Ohio law), and *CBS, Inc. v. Folks (In re Folks)*, 211 B.R. 378, 385 (B.A.P. 9th Cir. 1997) (same under California law), with *Mixon v. Anderson (In re Ozark Restaurant Equip. Co.)*, 816 F.2d 1222, 1225 (8th Cir.) (alter ego claim belongs to creditor under Arkansas law, so trustee lacked standing), *cert. denied*, 484 U.S. 848 (1987).

⁴ See, e.g., *Shearson Lehman*, 944 F.2d at 119-20 (under New York law, a "churning" claim belonged to the corporation, so the trustee had exclusive standing to bring it, but the trustee

the various cases it cites "cannot be reconciled." Pet. 15. But the more important point, for present purposes, is that these cases all articulate and apply the same rule that the Ninth Circuit followed here.⁵ If there are any irreconcilable outcomes, they are a function not of confusion as to what the rule is, but inevitable disagreements as to how to apply it to a new set of facts.

Carlyle does not seek certiorari to review the Court of Appeals' conclusion that Carlyle's suit "constitutes an injury to the bankrupt corporation itself, not an individual creditor of that corporation." App. 6. Yet, at points its petition appears to dispute that holding. See App. 17 (arguing that "the rights under a lease accrue only to the landlord, not to creditors of the tenant"). To the extent Carlyle seeks review of that holding, this Court should reject the invitation to delve into a fact-bound determination that revolves around particulars of state law.

lacked standing to bring a second claim that alleged damage only to "client of" the debtor).

⁵ See, e.g., *Koch Refining v. Farmers Union Cent. Exchg., Inc.*, 831 F.2d 1339, 1349 (7th Cir. 1987) (trustee has exclusive standing to bring a claim that alleged injury to the debtor-corporation because the creditor-claimant "had been injured only in an indirect manner"); *Steinberg*, 40 F.3d at 892-93 (holding that the trustee lacked standing because "the only injured person here is the [creditor]," and "[w]hen a third party has injured not the bankrupt corporation itself but a creditor of that corporation, the trustee in bankruptcy cannot bring suit against the third party").

B. The Purported Circuit Split Carlyle Claims to Present Is Illusory.

Even if this case did present the question Carlyle poses, and even if the Court of Appeals had addressed it, the question would not be worthy of this Court's consideration. The circuits do not disagree as to whether, under 11 U.S.C. § 541(a), a trustee has standing to bring a claim that belongs to creditors. Their uniform answer is no. No circuit has upheld standing for a trustee bringing a claim that actually belongs to creditors—i.e., a claim that is premised on direct harm to the creditors, as opposed to harm that is derivative of harm to the bankrupt debtor.

Carlyle does not cite a single case that reaches the opposite conclusion. It cites no case upholding a trustee's standing to press a claim that actually belongs to the creditors, and no case barring creditors from bringing a claim that belongs to them.

Instead, Carlyle performs the verbal equivalent of an amateur parlor trick. It tries to create the illusion of a conflict by stringing together several isolated quotes that seem superficially contradictory—until you stare at them a few seconds longer. These snippets are to the effect of: “[i]f a claim is a general one, with no particularized injury arising from it, . . . the trustee is the proper person to assert the claim,” *Kalb, Voorhis & Co.*, 8 F.3d at 132, or “[a] trustee may maintain only a general claim,” *Koch Refining*, 831 F.2d at 1349. Not a single one of these cases holds that a bankruptcy trustee *does* have standing to press claims on behalf of creditors—claims where the creditors, not the

debtor, were the subject of the injury. Rather, in each situation, Carlyle's misdirection consists of exploiting different uses of the word "general." These snippets use the word "general" as a synonym for "derivative." They use the phrase to describe an injury to the *debtor* that happens to have inflicted harm on all the creditors. In this usage, the "general claim" is distinguished from a "personal" or "particularized" claim, in which injury was inflicted directly on a particular creditor. In these passages, trustees bring "general" claims in the sense that their recoveries benefit all creditors generally—not in the sense that they are asserting claims, *on behalf of* creditors, that actually *belong to* all creditors.

One good example of this usage is *In re Folks*, 211 B.R. 378, which Carlyle features as a poster-child for the proposition that trustees may bring general claims on behalf of creditors. See Pet. at 13-14. The court there detailed the difference between "General v. Particularized Injury": A "general" claim, is one "with no particularized injury arising from it, *which is based upon injury to the corporate debtor* and all its creditors, rather than a personal claim belonging to any individual creditor." *Folks*, 211 B.R. at 387-88 (emphasis added).

This same distinction explains why several circuits take positions on *both* sides of the artificial dichotomy Carlyle tries to draw. See Pet. 14-16 (cataloguing supposed conflicts). Carlyle characterizes the duality as "Intra-Circuit Conflict[s]" (without explaining why this Court should abandon its customary practice of declining to resolve intramural conflicts within a circuit). Pet. 14. But the accused circuits do not see it that way.

Take, for example, the Seventh Circuit, which is the source of the above-quoted snippet that “[a] trustee may maintain only a general claim.” *Koch Refining*, 831 F.2d at 1349. Carlyle juxtaposes this quote against a passage in a later Seventh Circuit case holding that “the trustee . . . has no right to enforce entitlements of a creditor.” *Steinberg*, 40 F.3d at 893. Carlyle asserts that the two opinions “cannot be reconciled.” Pet. 15. The only way to make this assertion true is to read the quotes really fast—and then ignore every word of both opinions except the quoted words. Not only can they be reconciled, but the second opinion, written by Judge Posner, explains at length exactly how to reconcile them. The key lies in getting past the imprecise nomenclature. The Seventh Circuit explained that the earlier opinion’s description of claims as either “general” or “personal” was “not an illuminating usage.” *Id.* at 893. The real question in that earlier case, and in all cases like this, is whether the injury befalls the creditor directly, or whether the harm to the creditor is derivative of the harm to the debtor:

The point is simply that the trustee is confined to enforcing entitlements of the [debtor]. He has no right to enforce entitlements of a creditor. [The trustee] represents the unsecured creditors of the corporation; and in that sense when he is suing on behalf of the corporation he is really suing on behalf of the creditors of the corporation. But there is a *difference between a creditor's interest in the claims of the corporation against a third party, which are*

enforced by the trustee, and the creditor's own direct—not derivative—claim against the third party, which only the creditor himself can enforce.

Id. (emphasis added).

More recently, the Fifth Circuit made the same point, resolving the confusion that arose from the same imprecise nomenclature:

The discussion of personal and general claims . . . was not meant to work a change to th[e] well-established rule, even when the claims at issue may be brought by a number of creditors instead of just one. Rather, our point was that some claims that are usually brought by creditors outside of bankruptcy (and thus in a sense may be said to “belong to” the creditors and not the debtor) are nonetheless vested exclusively in the trustee in bankruptcy.

Highland Capital Mgmt LP v. Chesapeake Energy Corp. (In re Seven Seas Petroleum, Inc.), 522 F.3d 575, 588-89 (5th Cir. 2008). The court continued, “It is ‘[a]ctions by individual creditors asserting a generalized injury to the debtor’s estate, which ultimately affects all creditors[,]’ that can be said to raise a ‘generalized grievance,’ not actions by creditors that are merely common to a number of them.” *Id.* at 589 (citation omitted).

In short, despite variations in terminology, these courts uniformly apply the same rule—the very rule the Ninth Circuit applied in this case. This Court

need not grant certiorari to align the lower courts around a single lexicon—particularly since they are already falling into line of their own accord.

II. THE VALIDITY OF THE WAGONER RULE IS NOT A CERT.-WORTHY QUESTION.

Carlyle next urges the Court to resolve the validity of the so-called “*Wagoner* rule,” as articulated by the Second Circuit in *Shearson Lehman Hutton, Inc. v. Wagoner*, 944 F.2d 114 (2d Cir. 1991). The Ninth Circuit declined to follow the rule in this case. App. 7. This Court should refuse Carlyle’s invitation for three reasons: (A) the issue is merely a variation of the first question, which itself is not cert.-worthy; (B) the *Wagoner* rule is a product of the application of state law; and (C) the *Wagoner* rule does not apply—and has never been applied—in circumstances like these.

A. The Second Question Is Merely A Variant Of The First Question Concerning Ownership Of Claims.

The *Wagoner* rule, as the Second Circuit articulates it, is as follows: “A claim against a third party for defrauding a corporation with the cooperation of management accrues to the creditors, not to the guilty corporation.” *Id.* at 120. As noted in Part I, a bankruptcy trustee’s standing to sue third parties depends upon whether the claim being pursued is property of the bankruptcy estate. 11 U.S.C. §704(1) (“trustee shall . . . collect and reduce to money the property of the estate . . .”); §541(a)(1) (defining “property of the estate” to

include any interest in property that the debtor had as of the commencement of the bankruptcy case). Whether a cause of action is property of the estate belonging to the trustee, or belongs to creditors, is a question of state law. *Barnhill v. Johnson*, 503 U.S. 393, 398 (1992). On its face, *Wagoner* is merely an articulation of one circumstance in which a creditor might be found to own a claim that, in other jurisdictions, would belong to the bankruptcy estate.

In other words, Carlyle's protest of the Ninth Circuit's refusal to adopt the Second Circuit's *Wagoner* rule in this case reflects Carlyle's confused thinking about the dispositive analysis: (a) What determines a party's standing to sue is whether that party owns the claims it would assert; (b) where a bankruptcy is implicated, ownership of the claims depends upon analysis of whether that claim is property of the estate; and (c) what constitutes property of the estate is largely a question of state law. Therefore, if the claim the creditor would assert is, under the relevant state law analysis, property of the bankruptcy estate, the creditor does not own the claim and lacks standing to pursue it. If it is not property of the estate, then the creditor must still demonstrate ownership to establish standing, but at least is not foreclosed by the bankruptcy trustee's exclusive standing.

As we observed above, *see supra* Point I, every circuit in the country follows this analytical framework. The Second Circuit's *Wagoner* rule is nothing more than a part of that analysis, applied in circumstances where New York law controls and the debtor and the defendant were in cahoots. This is, therefore, still a debate about the first question: who

owns the claims that Carlyle would assert? The second question thus presents no more compelling a case for certiorari than the first.

B. The Wagoner Rule is the Product of New York State Law.

Carlyle describes the disagreement between the Second Circuit and other circuits over whether to apply the *Wagoner* rule as an “irreconcilable inter-circuit conflict.” Pet. 25. In truth, the conflict is nothing of the sort; state law differences account entirely for the different results.

Under *Wagoner*, as a matter of New York state law the property of the bankruptcy estate does not include claims against third parties for injuries caused by the misconduct of the debtor’s controlling managers. See *Ernst & Young v. Bankruptcy Services, Inc.*, (*In re CBI Holding Co.*), 529 F.3d 432, 447 (2d Cir. 2008) (“**Under New York law**, ‘[a] claim against a third party for defrauding a corporation with the cooperation of management accrues to the creditors, not to the guilty corporation.’”) (emphasis added); *Mediators, Inc. v. Manney* (*In re Mediators, Inc.*), 105 F.3d 822, 826 (2d Cir. 1997) (“In *Wagoner*, we held that, **under New York law**, a bankruptcy trustee had no standing to sue Shearson Lehman Hutton for aiding and abetting the unlawful investment activity of . . . the president and sole shareholder of a bankrupt corporation.”) (emphasis added). While the Second Circuit in *Wagoner* did not explain its rationale for the rule, lower courts have surmised that it derives from the application of New York’s state law equitable affirmative defense of *in pari delicto*,

which prohibits a company from suing someone else for injuries that the company's own management helped inflict. See, e.g., *Schertz-Cibolo-Universal City v. Wright (In re Adelphia Commc'ns Corp.)*, 365 B.R. 24, 45 (Bankr. S.D.N.Y. 2007); *Buchwald v. The Renco Group, Inc., (In re Magnesium Corp. of Am.)*, 399 B.R. 722, 764 (Bankr. S.D.N.Y. 2009); but see *Official Committee of the Unsecured Creditors of Color Tile, Inc. v. Coopers & Lybrand, LLP*, 322 f.3d 147, 157 (2d Cir. 2003) ("Wagoner had nothing to do with affirmative defenses."). Thus, New York state law conflates the equitable defense of *in pari delicto* with questions of standing, and analyzes the questions together.

At bottom, Caryle's lament is that its claims are not governed by New York law, where it might have benefited by application of the *Wagoner* rule. This case, however, is governed by California law. Unlike New York, most other jurisdictions—including California—treat questions of standing and the affirmative defense of *in pari delicto* as "analytically distinct concepts." See *Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP*, 133 Cal. App. 4th 658, 677 (2005) ("Although some cases have considered the bankrupt entity's unclean hands (generally referred to in federal decisions as *in pari delicto* doctrine) as an element of standing, they are analytically distinct concepts.") (citations omitted).⁶

⁶ See also *Moratzka v. Morris (In re Senior Cottages of America, LLC)*, 482 F.3d 997, 1003 (8th Cir. 2007); *Baena v. KPMG*, 453 F.3d 1, 7 (1st Cir. 2006) (*in pari delicto* has nothing to do with standing); *Official Comm. Of Unsecured Creditors of PSA, Inc. v. Edwards*, 437 F.3d 1145, 1149 (11th Cir. 2006) ("an analysis

In *Peregrine*, the California Court of Appeals found that a trustee enjoyed standing to bring his claims, but that the unique procedural context of that case permitted a dismissal. The defendant filed a special motion to strike that, under the relevant California statute, shifted the burden to the plaintiff to show a probability of success on the merits. The trustee's complaint contained sufficient allegations of misconduct by the debtor—which the Court termed “admissions”—to support the *in pari delicto* affirmative defense, so the court adjudicated the matter on that basis. Plainly, a California court would treat *in pari delicto* as a defense, and not divest a trustee of ownership of the claim, and so standing. The nuances of individual states' applications of the *in pari delicto* defense, while perhaps worthy of a law school student note, do not compel certiorari review.

The Court of Appeals in this case correctly determined that notions of *in pari delicto* do not divest a bankruptcy trustee of exclusive standing to pursue claims otherwise owned by the estate. That a court applying New York law might reach a different conclusion is neither remarkable nor worthy of this Court's attention.

of standing does not include an analysis of equitable defenses, such as *in pari delicto*”); *Lafferty*, 267 F.3d at 346 (“whether a party has standing to bring a claim and whether a party's claims are barred by an equitable defense are two separate questions”); *In re Educator's Group Health Trust*, 25 F.3d 1281, 1286 (5th Cir. 1994) (rejecting “the proposition that a defense on the merits of a claim precludes the debtor from bringing the claim.”)

**C. The Wagoner Rule Does Not Apply
in the Circumstances Here.**

Carlyle also asks this Court to rule on a unique and unprecedented application of the *Wagoner* rule. Carlyle invokes the *in pari delicto* doctrine, shorn from its legal context or any understanding of its function, to argue that a different plaintiff in an entirely independent lawsuit should be divested of standing to prosecute that second action. Carlyle cites no cases applying the rule in this manner, and for good reason: no bankruptcy trustee could ever pursue claims of the debtor against any person if a creditor could divest the trustee of standing by the simple expedient of filing its own lawsuit against the same defendant, and fill it with artful allegations that the defendant and the debtor were collaborators in the wrongs that led to the debtor's insolvency.

Certainly, research has uncovered no cases in which a court has ever divested a trustee of standing in his lawsuit as a result of allegations made by a creditor in an entirely different and separate lawsuit. The argument is especially peculiar here where the trustee's lawsuit has been adjudicated to judgment without consideration of any *in pari delicto* defense. Rather, in every case in which the *Wagoner* rule has been considered, it is asserted by a defendant against a trustee to dismiss the trustee's complaint. The *Wagoner* rule simply has no applicability in the circumstances here.

III. THIS COURT SHOULD NOT REVIEW AN ISSUE OF FIRST IMPRESSION ABOUT WHEN A LANDLORD MAY EVADE A STATUTORY CAP ON LANDLORD CLAIMS.

Carlyle's third question is: "As between a Chapter 11 reorganization trustee and creditor of the estate, does a creditor (landlord) have standing to pursue claims against a third party for lease damages in excess of the 11 U.S.C. § 502(b)(6) 'cap.'" Pet. ii. Carlyle breathlessly announces that this is a "question of first impression," Pet. 30—not just for the courts of appeals, but for any court anywhere. It adds that "[d]espite extensive research, Carlyle did not find any case law addressing th[is] question," other than the Ninth Circuit's unpublished opinion in this case. Pet. 27. Trying to win certiorari on this basis is like trying to gain admission to Heaven by announcing, "I've never done anything good."

That is reason alone to deny admission. Carlyle offers no reason for this Court to depart from its custom of reviewing only those issues that have fully percolated in the courts of appeals. Certainly, the question whether a landlord may evade the statutory cap of 11 U.S.C. § 502(b)(6) is not the sort of earth-shattering issue of such profound and urgent importance that it cries out for immediate resolution without the benefit of lower court vetting.

The most that Carlyle offers is that "[t]he Ninth Circuit's reasoning is erroneous." Pet. 28. But until this Court decides to transform into a court of errors, that is a singularly unpersuasive reason.

In any event, the claim of error is irrelevant, and incorrect. It is irrelevant because the Ninth Circuit rejected Carlyle's claim on the basis of an alternative ground, rooted entirely in state law. It held that regardless of the outcome of the bankruptcy law question, "[t]he district court properly held that the California statute of frauds barred Carlyle's claim that NVIDIA is liable for damages above the cap because Carlyle's complaint failed to allege there was a written assumption of the lease signed by NVIDIA." App. 7. In fact, this state law ground was *the* reason that the district court invoked for rejecting Carlyle's claim for rent in excess of the cap; it assumed that Carlyle had standing to sue NVIDIA, but dismissed the claim as precluded by the statute of frauds (App. 24-26) and on other state law grounds. App. 19-20. Since this Court does not sit to resolve issues of state law, *see infra* Point IV, nothing it says about the statutory cap will have any effect on the outcome of this case.

The claim of error, moreover, is incorrect, because the Court of Appeals' analysis was spot on. Nothing in "§ 502(b)(6) gives rise to a particularized injury that divests the Trustee of standing." App. 6-7. The provision does not constrain the powers of the trustee or limit his standing in any way. Rather, it limits the allowance of *claims* that belong to secured creditors. "[S]o the cap impairs the Creditors' claims regardless of whether the Trustee or the Creditors pursue the claim." App. 7. Moreover, the cap is not itself an "injury"; it is a function of the application of the Bankruptcy Code's legislatively mandated claims allowance process; it has no bearing on whether Carlyle has standing to sue. *See Smith*, 421 F.3d at

1004-5 (disparate treatment of creditors based on application of the Bankruptcy Code “irrelevant” to question of standing).

IV. THE COURT SHOULD NOT REVIEW A QUESTION OF STATE LAW ABOUT CALIFORNIA’S STATUTE OF FRAUDS.

Carlyle’s final argument is that “review is necessary to determine whether the Ninth Circuit erred in finding that e-mails cannot satisfy the statute of frauds.” Pet. 31 (capitalization omitted). This conclusion, Carlyle asserts, “is contrary to California statute and case law.” *Id.* This is the antithesis of a cert.-worthy issue (and Carlyle is wrong anyway). The state law issue does not become any more cert.-worthy just because Carlyle says that the supposed error is “manifest.” Pet. 33.

CONCLUSION

For the foregoing reasons, the Court should deny Carlyle’s petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

IN THE UNITED DISTRICT COURT
FOR THE NORTHERN DISTRICT OF
CALIFORNIA
SAN JOSE DIVISION

CARLYLE FORTTRAN TRUST, NO. C 05-00427 JW

Plaintiff,

v.

NVIDIA CORPORATION, et al.,

Defendants.

**ORDER
DISMISSING
THIRD
AMENDED
COMPLAINT
WITH LEAVE TO
AMEND;
SETTING
FURTHER CASE
MANAGEMENT
CONFERENCE**

I. INTRODUCTION

The former directors and officers of 3dfx Interactive, Inc. (3dfx Defendants), the nVidia individual defendants, and nVidia Corporation, nVidia U.S. Investment (nVidia Defendants), (collectively "Defendants") seek dismissal of the newly asserted claims set forth in the Third Amended Complaint ("TAC") filed by Carlyle Forttran Trust ("Carlyle"). On October 18, 2005, this Court held a hearing on Defendants' motions. For the reasons set forth below, this Court dismisses the claims in the TAC for lack of standing and grants

Carlyle leave to amend in accordance with this Order.

II. BACKGROUND

Based upon the papers filed by the parties, the following facts are uncontested: 3dfx was a public company in the business of developing and selling graphic chips, graphics boards, and related technology. Pursuant to a lease dated August 7, 1996, Carlyle leased approximately 77,000 square feet of commercial space in San Jose, California to 3dfx. nVidia was a competitor of 3dfx also in the business of developing and selling graphics technology. In late 2000, nVidia and 3dfx structured and entered into an Asset Purchase Agreement ("APA") where nVidia paid \$70 million in cash plus 1,000,000 shares of nVidia common stock for certain assets of 3dfx including its portfolio of patents, trademarks, and applications. The APA also provided that 3dfx would dissolve after consummating its transaction with nVidia. The parties dispute the exact effects and motivations behind the structuring of the APA's terms.

On January 1, 2002, 3dfx ceased paying rent. Carlyle filed a complaint in the Santa Clara County Superior Court against 3dfx, nVidia and their respective directors and officers for, inter alia, intentional interference with contract, fraudulent transfer, and unfair business practices. 3dfx then filed for relief in bankruptcy under Chapter 11. On January 3, 2003, the nVidia Defendants removed Carlyle's State Court action to the Bankruptcy Court. The bankruptcy court appointed a trustee

("Trustee"), who filed a complaint against nVidia and a subsidiary. The Trustee subsequently filed an action against the 3dfx Defendants in the San Mateo County Superior Court. On September 21, 2004, the Trustee and the 3dfx Defendants entered into a Settlement Agreement and Mutual Release ("Settlement Agreement") pursuant to which the 3dfx Defendants were to pay \$5.5 million. The Settlement Agreement was approved by the bankruptcy court on November 19, 2004.

By Order on May 6, 2005, this Court withdrew the reference of Carlyle's action from the Bankruptcy Court. In July of 2005, the nVidia and 3dfx Defendants filed the present motion to dismiss claims in Carlyle's TAC.

III. STANDARDS

Under Rule 12(b)(6), a plaintiff's claims or entire complaint may be dismissed by the court for "failure to state a claim upon which relief can be granted." Rule 12(b)(6). See, e.g., Jack Russell Terrier Network of N. Cal. v. Am. Kennel Club, 407 F.3d 1027, 1032 (9th Cir. 2005) (affirming district court's partial Rule 12(b)(6) dismissal). A Rule 12(b)(6) motion tests the legal sufficiency of the claims stated in the complaint. The court must decide whether the facts alleged, if true, would entitle plaintiff to some form of legal remedy. Unless the answer is unequivocally in the negative, the motion must be denied. Conley v. Gibson, 355 U.S. 41, 45-46 (1957); De La Cruz v. Tormey (9th Cir. 1978). In resolving a Rule 12(b)(6) motion, the court must (1) construe the complaint in the light most

favorable to the plaintiff, (2) accept all well-pleaded factual allegations as true, and (3) determine whether plaintiff can prove any set of facts to support a claim that would merit relief. Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 337-38 (9th Cir. 1996). Because of the liberal federal pleading rules, a 12(b)(6) dismissal is proper only in “extraordinary” cases. U.S. v. Redwood City, 640 F.2d 963, 966 (9th Cir. 1981).

IV. DISCUSSION

As an initial matter, Carlyle must have standing to pursue the claims it asserts in the TAC. Defendants contend that Carlyle has no standing to bring certain claims in the TAC, because such claims belong exclusively to the Trustee.¹ Carlyle argues that the Trustee has no standing to pursue the claims in the TAC because these claims do not belong to the debtor. Contrary to Carlyle’s position, the law of the Ninth Circuit requires that this Court dismiss the general claims in the TAC for lack of standing.

¹ In the motions presently before the Court, Defendants do not apply their standing argument to every claim in the TAC. However in the interests of judicial efficiency, and in accordance with a district court’s “power and...duty to raise the adequacy of [plaintiff]’s standing sua sponte,” Bernhardt v. County of Los Angeles, 279 F.3d 862, 868 (9th Cir. 2002), this Court will determine Plaintiffs’ standing as to each claim in the TAC.

Under California law as interpreted by the Ninth Circuit, the authority to pursue a debtor's general causes of action is delegated exclusively to the bankruptcy trustee, unless the creditor can show particularized injury. In re Folks, 211 B.R. 378 (9th Cir. BAP 1997). In In re Folks, the Ninth Circuit held that the bankruptcy trustee has exclusive jurisdiction for general claims: "If a claim is a general one, with no particularized injury arising from it, and if that claim could be brought by any creditor of the debtor, the trustee is the proper person to assert the claim, and the creditors are bound by the outcome of the trustee's action." Id. at 386. In so doing, the Ninth Circuit defined personal claims as those held by the creditor, and distinguished these personal claims from general claims over which the bankruptcy trustee has exclusive standing:

A cause of action is personal if the claimant himself is harmed and no other claimant or creditor has an interest in the case. A general claim exists if the liability is to all creditors of the corporation without regard to the personal dealings between such officers and creditors.

Id. at 386 (citations and quotations to Koch v. Farmers Union Cent. Exchange, Inc., 831 F.2d 1339 (7th Cir. 1987) omitted). More recently, the Ninth Circuit has expanded the holding of In re Folks to grant standing to a bankruptcy trustee where the trustee alleged that defendants' "dissipation of assets limited the firm's ability to pay creditors." In

re Smith, 421 F.3d 989, 1004 (9th Cir. 2005). Recognizing that “the economic reality that any injury to an insolvent firm is necessarily felt by its creditors,” the Ninth Circuit in In re Smith nevertheless held that the defendants’ acts in dissipating corporate assets gave rise to a general claim. Id.²

A. Claims in the TAC Based on Dissipation of Assets Caused by the APA

A number of the claims in the TAC are based on the general allegation that the structure of the APA dissipated the amount of assets available to pay all creditors. For example, claims 1 and 2 allege that the dissolution of 3dfx, and 3dfx’s subsequent inability to pay rent interfered with the contractual

² At the hearing on October 18, 2005, and in Plaintiff’s Motion for Leave to File (Docket No. 129), Carlyle argued that In re Smith supports its position because the Ninth Circuit did not expressly grant the bankruptcy trustee *exclusive* standing. First, even if Carlyle is correct that In re Smith only held that the trustee has standing along with the creditors, the holding in In re Folks granting the bankruptcy trustee exclusive standing for general creditor claims has not been superceded by other Ninth Circuit or Supreme Court decisions. Second, on this Court’s reading of In re Smith, the trustee action was the only case before the Ninth Circuit, and thus it had no jurisdiction to deny standing to a separate action involving plaintiffs before a Colorado court.

and economic relations between 3dfx and Carlyle. As alleged, however, these claims are not particular to Carlyle. The dissolution of a corporation where liabilities exceed assets rendering the corporation unable to fulfill its obligations, is at the heart of bankruptcy. The exact injury to each creditor as a result of the dissolution of an insolvent corporation may vary, but this variation does not make the injury "particularized" within the meaning of the term as used by the Ninth Circuit. Since the injury caused by the dissolution of 3dfx with insufficient assets to pay its obligations is "to all creditors of the corporation without regard to the personal dealings between such officers and creditors," In re Folks, 211 B.R. at 386, the Trustee has exclusive jurisdiction to assert the claims arising out of the allegedly APA-caused dissolution of 3dfx.

In its papers, Carlyle points to its allegations in ¶¶ 86-88 as particularized claims. In these paragraphs, Carlyle alleges that at the time of the APA, Defendants agreed that nVidia or its subsidiary would be assuming the Lease, but shortly before Defendants closed the asset purchase transaction at issue, nVidia and its subsidiary refused to assume the Lease. However, the core of these allegations is a general creditor claim of simply increased general liability based on Defendants' refusal to assume the lease. Carlyle states that nVidia "refused to assume the Lease, thereby leaving 3dfx with an additional liability in excess of \$7 million without any additional Cash Consideration or Stock Consideration to deal with such liability." (TAC ¶ 87.) The dissipation of corporate assets resulting from an additional \$7

million in liabilities is a harm to the bankruptcy estate common to all creditors. See In re Smith, 421 F.3d at 1004. Accordingly, the Trustee has exclusive jurisdiction over the claims in ¶ 86-88 that are based on additional liabilities of the estate.

B. Claims Based on Insufficient Consideration Provided by the APA for 3dfx's Assets.

To the extent that the claims in the TAC are based on an allegation that the APA provided insufficient consideration for 3dfx's assets, the claims are general and are also to be exclusively asserted by the Trustee. For example, claims 3-5 for fraudulent transfer are primarily based on Carlyle's allegations that the APA provided "inadequate value" for 3dfx's assets. Such claims based on the amount of consideration provided under the APA for the assets of 3dfx are general claims which could be brought by any creditor of the debtor. Under the rule of the Ninth Circuit in In re Folks, the Trustee has exclusive jurisdiction over claims based on insufficient consideration as a result of the APA.

Similarly, Claim 6 of the TAC alleges successor liability based on the nVidia Defendants' actions in having "acquired substantially all of the assets of 3dfx and paid inadequate consideration therefor" through the APA, and that the nVidia Defendants acted "for the fraudulent purposes of allowing 3dfx to evade its liability to Carlyle." (TAC, ¶ 138.) While a claim that an asset purchase agreement designed to escape liability from a particular creditor would ordinarily be an allegation

of particularized injury, there does not seem to be anything in the TAC that alleges that Defendants acted with Carlyle in mind. At the hearing, Carlyle argued that their injury was particularized because Defendants' due diligence prior to the APA made Defendants aware of the terms of the Lease. However, Defendants were likely aware of all creditors' contracts with 3dfx, and Carlyle does not allege that Defendants were particularly aware of the ease, or structured the APA to evade the Lease in particular. Based on the facts alleged in the TAC, any creditor could allege that the APA was "for the fraudulent purposes of allowing 3dfx to evade its liability" to any or all of the creditors. Accordingly, because Carlyle has alleged insufficient facts to support a claim that Defendants entered into the APA to evade liability to Carlyle in particular, claim 6 is also a general claim that the Trustee has exclusive standing to assert.

C. Claims Based on Breach of Fiduciary Duty and Aiding and Abetting Breach of Fiduciary Duty in Entering into the APA

As to Carlyle's claims regarding breach of fiduciary duty, Carlyle argues that it has standing because California law recognizes a fiduciary duty of the directors and officers of an insolvent corporation to its creditors. Under California law, a claim could be stated that the 3dfx Defendants breached their fiduciary duties to the creditors of 3dfx when 3dfx was in the zone of insolvency. However, Carlyle is not the proper party to assert this claim. The Ninth Circuit in In re Smith declined to rule on whether

the creditors could have asserted these claims outside the bankruptcy context “because state law often permits creditors to pursue derivative claims on an insolvent corporation’s behalf when the corporation itself has been injured by breaches of fiduciary duty.” 421 F.3d at 1006. The Ninth Circuit in In re Folks, however, already found that under California state law, derivative claims on an insolvent corporation’s behalf are asserted exclusively by the bankruptcy trustee. 211 B.R. at 384-85. Furthermore, in the case cited by Carlyle, Saracco Tank & Welding Co. v. Platz, 65 Cal. App. 2d 305, 315 (1944), the court stated that “all of the assets of a corporation immediately on its becoming insolvent, become a trust fund for the benefit of all of its creditors.” (emphasis added). Because the claim that Defendants breached their fiduciary duty by entering into an APA which did not provide enough in cash for the bankruptcy estate is general to all creditors, the rule of In re Folks that the trustee has exclusive jurisdiction to assert claims where “liability is to all creditors of the corporation” bars Carlyle from asserting a claim for breach of fiduciary duty against the 3dfx Defendants. Similarly, Carlyle’s claim against nVidia Defendants that the nVidia Defendants aided and abetted the 3dfx Defendants’ breach of fiduciary duty is also dismissed to the extent that such a claim is general to all creditors.

D. Claims Based on the Structure of the APA

At oral argument, Carlyle argued that the Trustee does not have an interest in the claims in

the TAC because the claims are based on the structure of the APA as unfair to creditors, and not an allegation that the APA provided insufficient consideration for 3dfx's assets.³ In other words, Carlyle reasons that each of the general claims asserted are general *creditor* claims belonging to creditors and not to the Trustee. The injury to Carlyle allegedly arose as a result of Defendants agreeing to a deal under the APA which only provided \$70 million in cash plus nVidia stock as opposed to the initial offer of \$100 million in cash with no stock. By the terms of their allegations, these claims are general. Because the Ninth Circuit

³ This Court notes that basing the claims on an argument that the APA was structured to minimize the assets available to repay creditors while allowing the shareholders to receive valuable stock consideration may have been secondary to the insufficient consideration allegations in the TAC. For example, the central allegation in the TAC is that the APA "stripp[ed] 3dfx of substantially all of its assets for inadequate consideration," resulting in injury to Carlyle (Claims 1 and 2, TAC ¶¶ 88, 96, 100), or that "3dfx transferred such assets to [nVidia Defendants] without receiving reasonably equivalent value in consideration therefor," (Claims 3-5, TAC ¶¶ 107, 118, 129), or that the nVidia Defendants "acquired substantially all of the assets of 3dfx and paid inadequate consideration therefor," (Claim 6, TAC ¶ 138), or "under the nVidia Agreement, inadequate consideration was given for 3dfx's assets" (Claim 9, ¶ 152).

has not expressly excluded general creditor claims from the broad grant of exclusive trustee jurisdiction over general claims in In re Folks, this Court is reluctant to carve out such an exception.

Carlyle claims to find support for its standing argument in In re Smith, where the Ninth Circuit cited to Steinberg v. Buczynski, 40 F.3d 890 (7th Cir. 1994) for the proposition that "when a third party has injured not the bankrupt corporation itself but a creditor of that corporation, the trustee in bankruptcy cannot bring a suit against the third party." In re Smith, 421 F.3d at 1002-03. Carlyle's reliance on the Ninth Circuit's citation of Steinberg is misplaced. In Steinberg, a plumber's union pension fund obtained a judgment against a plumbing corporation for ERISA-required contributions. The corporation then declared bankruptcy. The bankruptcy trustee brought an adversary proceeding against the corporation's two shareholders seeking to pierce the corporate veil and hold the shareholders personally liable for the corporation's debt to the pension fund. In holding that the bankruptcy trustee did not have standing to assert this claim, the Seventh Circuit relied on the fact that the trustee had failed to allege any wrongs by the shareholders. Id. at 891. In this case, Carlyle is not simply attempting to collect on rent due prior to the 3dfx bankruptcy. The claims asserted in the TAC, instead, stem from the actions of Defendants entering into the APA and that the APA (or structure thereof) left the estate with insufficient funds to make rental payments. The Steinberg opinion itself finds that it would have granted the bankruptcy trustee standing had the trustee

sufficiently alleged that the shareholders diverted assets to their personal use thus minimizing the amount available to pay the pension fund. *Id.* at 892.

This Court recognizes the potential for a conflict of interest between the shareholders and the creditors when Defendants entered into the APA. However, a bankruptcy trustee, appointed after the corporation's liabilities exceed its assets, is the representative of the *bankrupt estate*. Among the trustee's duties is the obligation to "collect and reduce to money the property of the estate," 11 U.S.C. §704(1). The "property of the estate" includes "all legal or equitable interests of the debtor in property as of the commencement of the case," 11 U.S.C. §541(a)(1), including the debtor's "causes of action." *In re Smith*, 421 F.3d at 1002. At the time of commencement of the Chapter 11 proceedings, Defendants had already entered into the APA. Thus, the "interests of the debtor in property as of the commencement of the case" includes the interest to have the bankrupt estate consist of \$100 million in cash instead of \$70 million in cash. Accordingly, the diminution in assets of the bankrupt estate as a result of the structure of the APA is the debtor's cause of action properly asserted exclusively by the Trustee.

V. CONCLUSION

For the reasons set forth above, this Court dismisses the TAC. Carlyle is ordered to file a Fourth Amended Complaint limiting its claims and allegations in accordance with this Order by February 4, 2006. Failure to file a Fourth Amended

Complaint by this deadline may result in dismissal. The parties are ordered to appear before the Court on April 18, 2006 at 10:00 a.m. for a case management conference.

Dated: November 10, 2005

/s/James Ware
JAMES WARE
United States
District Judge

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APP. 16

Dated: November 10, 2005

Richard W. Wieking, Clerk

By: /s/ JW Chambers

Ronald L. Davis

Courtroom Deputy

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

CARRAMERICA REALTY CORPORATION, NO. C 05-00428 JW

Plaintiff,

Related Cases:

5 :05-cv-00427-JW

5 :05-cv-00429-JW

5 :06-cv-03 856-JW

5 :06-cv-0323 8-JW

v.
NVIDIA CORPORATION,
et al.,

Defendants.

**ORDER GRANTING
DEFENDANTS'
MOTIONS TO
DISMISS
CARRAMERICA'S
THIRD AMENDED
COMPLAINT**

I. INTRODUCTION

CarrAmerica Realty Corporation ("CARR") brought this action against nVidia Corporation ("NVIDIA"), individual nVidia executives (collectively, "NVIDIA Defendants"), and the former directors and officers of 3DFX Interactive, Inc. ("3DFX Defendants") (collectively, "Defendants"), alleging twelve causes of action related to the now dissolved 3DFX Interactive, Inc.'s ("3DFX") breach of its lease with CARR. The

Defendants move to dismiss the claims set forth in CARR's Third Amended Complaint. (hereafter, "TAC," Docket Item No. 83). The Court deemed it appropriate to take the motions under submission without oral argument. See Civ. L.R. 7-1(b). Based on the papers submitted to date, the Court GRANTS Defendants' motions.

II. BACKGROUND

On November 10, 2005, the Court dismissed CARR's Second Amended Complaint ("SAC," Docket Item No. 27) for lack of standing, and entered an Order granting CARR leave to file a Third Amended Complaint. (Order Dismissing Second Amended Complaint With Leave to Amend; Setting Further Case Management Conference, hereafter, "November 10, 2005 Order," Docket Item No. 82.)

In its Third Amended Complaint, CARR alleges the following:

3DFX was a public company in the business of developing and selling graphic chips, graphics boards, and related technology. (TAC ¶ 11.)

CARR leased approximately 26,000 square feet of commercial space in Austin, Texas to 3DFX on or about July 23, 1998. (TAC ¶ 8.) The lease ran through August 31, 2003. (TAC ¶ 9.)

On or about December 15, 2000, 3DFX and its competitor, NVIDIA, entered into an Asset Purchase Agreement (the "Agreement")

under the terms of which at closing NVIDIA would pay to 3DFX \$70 million in cash and approximately \$40 million in NVIDIA stock in exchange for the transfer to NVIDIA of specified assets of 3DFX including its portfolio of patents, trademarks, and applications. The Agreement also provided that 3DFX would dissolve after closing the asset sale to NVIDIA. (TAC ¶¶ 13, 46.)

At the time of the Agreement, CARR had no knowledge of the agreement. (TAC ¶ 13.)

NVIDIA sought to conceal the true nature of its agreement with 3DFX by labeling the agreement an "asset purchase" because NVIDIA wanted to acquire all of 3DFX's assets without becoming liable to 3DFX's creditors which included CARR. (TAC ¶ 14.)

On or about December 15, 2000, immediately after execution of the Agreement, 3DFX ceased operations; its employees were terminated and were hired by NVIDIA. (TAC ¶ 18.)

At some unspecified date, but before the December 15 events described in ¶ 18, 3DFX and NVIDIA entered into a "secret agreement," to the effect that NVIDIA directed 3DFX "to continue making lease payments as if it, and not NVIDIA were occupying the premises and that NVIDIA would reimburse 3DFX for these payments at a future date. (TAC ¶ 21.)

The payments made pursuant to the "secret agreement" created the false impression that 3DFX remained a viable tenant. If CARR had known the "true state of affairs," it would have insisted that either NVIDIA assume the lease or that 3DFX vacate so that CARR could lease the premises to a new tenant. (TAC ¶ 21.)

Eventually, 3DFX stopped paying rent allegedly pursuant to the "secret agreement." (TAC ¶ 23)

On the basis of these allegations, CARR asserts claims for: 1) interference with contractual relations against the NVIDIA Defendants; 2) intentional interference with prospective economic advantage against the NVIDIA Defendants; 3) negligent interference with prospective economic advantage against the NVIDIA Defendants; 4) successor liability against NVIDIA; 5) fraudulent transfer against all Defendants under Civil Sections 3439.04(a); 6) 3439.04(b)(1); 7) and 3439.04(b)(2); 8) declaratory relief against all Defendants; 9) breach of fiduciary duty against the 3DFX Defendants; 10) fraud against all Defendants; 11) conspiracy against all Defendants; and 12) tort of another against all Defendants.

Defendants move to dismiss the Third Amended Complaint on the ground that it fails to allege facts which would entitle CARR to relief.

III. STANDARDS

A motion to dismiss under Federal Rule of Civil Procedure 12(b)(6) tests the legal sufficiency of a claim.

Navarro v. Block, 250 F.3d 729, 732 (9th Cir. 2001). A complaint may be dismissed as a matter of law for one of two reasons: "(1) lack of a cognizable legal theory or (2) insufficient facts stated under a cognizable theory." Robertson v. Dean Witter Reynolds, Inc., 749 F.2d 530, 534 (9th Cir. 1984). "A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Conley v. Gibson, 355 U.S. 41, 45-46 (1957). The court "must presume all factual allegations of the complaint to be true and draw all reasonable inferences in favor of the non-moving party." Usher v. City of Los Angeles, 828 F.2d 556, 561 (9th Cir. 1987) (citing Western Reserve Oil & Gas Co. v. New, 765 F.2d 1428, 1430 (9th Cir. 1985) cert. denied, 474 U.S. 1056 (1986)). However, the court "need not assume the truth of legal conclusions cast in the form of factual allegations." United States ex rel. Chunie v. Ringrose, 788 F.2d 638, 643 n.2 (9th Cir. 1986) (citing Western Mining Council v. Watt, 643 F.2d 618, 624 (9th Cir. 1981), cert. denied, 454 U.S. 1031 (1981)).

A motion to dismiss on the ground that the plaintiff lacks standing to pursue the claim is properly made pursuant to Federal Rule of Civil Procedure 12(b)(6). Michael Schmier v. United States Court of Appeals for the Ninth Circuit, et al., 279 F.3d 817 (9th Cir. 2002).

IV. DISCUSSION

- A. A creditor lacks standing to pursue a claim against a defendant for injury inflicted upon a bankrupt company because the right to pursue the claim vests in the Trustee, unless the creditor is alleging an injury particularized to that creditor only.

As explained in the November 10, 2005 Order, and despite CARR's insistence to the contrary, under California law as interpreted by the Ninth Circuit, standing to pursue a general creditor's cause of action is delegated exclusively to the bankruptcy trustee, unless a creditor can show particularized injury. In re Folks, 211 B.R. 378 (9th Cir. BAP 1997); (November 10, 2005 Order at 3.)

"If a claim is a general one, with no particularized injury arising from it, and if that claim could be brought by any creditor of the debtor, the trustee is the proper person to assert the claim, and the creditors are bound by the outcome of the trustee's actions." Id. (quoting Kalb, Voohis Co v. American Fin. Corp., 8 F.3d 130 (2d Cir. 1993) (citations omitted.)). A cause of action is general "if the liability is to all creditors of the corporation without regard to the personal dealings between [the corporation's] officers and such creditors." Id. (quoting Koch Refining v. Farmers Union Cent. Exchange, Inc., 831 F.2d 1339, 1349 (7th Cir. 1987)). If, on the other hand, "the claimant himself is harmed and no other claimant or creditor has an interest in the cause," the cause of action is personal to the creditor. Id. (quoting Koch

Refining, 831 F.2d at 1348-49.) Injury to the creditor is thus a determining factor. “To determine whether an action accrues individually to a claimant or generally to the corporation, a court must look to the injury for which relief is sought and consider whether it is peculiar and personal to the claimant or general and common to the corporation and creditors.” Koch, 831 F.2d at 1348-9.

Furthermore, the Ninth Circuit has expanded the holding of In re Folks to grant standing to a trustee of a bankrupt firm where the trustee alleges that a defendant’s dissipation of corporate assets limited the firm’s ability to pay its creditors. In re Smith, 421 F.3d 989, 1004 (9th Cir. 2005). Despite “the economic reality that any injury to an insolvent firm is necessarily felt by its creditors,” the Defendants’ acts in dissipating corporate assets via the Agreement gives rise to only a general claim for which the bankruptcy trustee has exclusive standing to pursue. *Id.*

B. CARR’s First Claim for Intentional Interference with Contractual Relations does not allege a claim for particularized injury.

CARR alleges that the NVIDIA Defendants intentionally interfered with the contractual relationship between CARR and 3DFX by entering into the Agreement and by entering into the “secret agreement.” This claim is essentially the same claim that was asserted in the Second Amended Complaint except for the alleged “secret agreement.” The Court has previously determined that CARR lacks standing to pursue claims resulting from the Agreement.

Therefore, the issue becomes whether, if CARR alleges breach of the lease and related claims pursuant to both the Agreement and the alleged "secret agreement," it states a claim for a particularized injury.

CARR contends that its Third Amended Complaint alleges a particularized injury because the alleged "secret agreement" only affected 3DFX's rental obligation to CARR. CARR contends that if, as it alleges, 3DFX ceased making rent payments and abandoned the premises "pursuant to" the alleged "secret agreement", this transforms its claim to one for a particularized injury.

Even accepting as true the allegation that 3DFX sold its assets and shut down its operations under both the Asset Purchase Agreement and this newly alleged separate "secret agreement," the cause of any harm suffered by CARR remains the transfer of assets and cessation of operations under the Agreement. Allegations that the harm suffered was caused by the alleged "secret agreement" to have 3DFX continue to pay rent is no more than artful pleading to avoid the overriding effect of the Agreement. If there was any interference with contractual obligations of 3DFX due to lack of notice of its impending demise, that interference came from lack of notice of the Agreement itself, which affected all creditors.

The Court is not called upon to comment whether the bankruptcy trustee has a claim against NVIDIA for contractual interference resulting from the alleged "secret agreement".

The Court DISMISSES CARR's First Claim for Intentional Interference with Contractual Relations without leave to amend on the ground that the alleged facts state a claim of harm to the corporation which affected all creditors.

C. CARR's Second and Third Claims for Intentional and Negligent Interference with Prospective Economic Advantage Claims have been withdrawn.

Given CARR's stated intention to withdraw the Second and Third Causes of Action in its submitted opposition papers, the Court DISMISSES CARR's Second and Third claims. (CARR's Memorandum of Points and Authorities in Opposition to the NVIDIA Defendants' Motion to Dismiss Third Amended Complaint, at 5, Docket No. 112.)

The dismissal is without prejudice; however, there is no reason to believe that the Court would not apply the same legal analysis to these claims as all other claims against NVIDIA.

D. CARR's Fourth Claim for Successor Liability is derived from its infirm First Claim and is thereby, dismissed.

CARR relies word-for-word on the allegations in its Second Amended Complaint to support its successor liability claim in its Third Amended Complaint. (Compare SAC ¶¶ 40-45 with TAC ¶¶ 39-44.) While CARR's allegations of a "secret agreement" between NVIDIA and 3DFX, described *supra*, are incorporated by reference into this claim, CARR has made no

attempt to draw a causal connection between the alleged "secret agreement" and its successor liability claim. Since the Court has previously determined that this claim as alleged in the Second Amended Complaint is a general claim for which CARR lacks standing to pursue, and CARR has not remedied its lack of standing, the Court **DISMISSES** CARR's Fourth Claim for Successor Liability without leave to amend.

E. CARR's Fifth, Sixth and Seventh Claims for Fraudulent Transfer are general claims and are thereby, dismissed.

CARR's allegations in support of its fraudulent transfer claims are substantially the same as those in its Second Amended Complaint. (Compare SAC ¶ ¶ 50-75 with TAC ¶ ¶ 45-73.) By way of explanation, CARR states that its prosecution of the claims were ordered stayed pending resolution of the underlying proceeding pending in the U.S. Bankruptcy Court for the Northern District of California, and that to the extent the stay is still binding, it will defer prosecution of the claims pending resolution of the adversary proceeding. (TAC ¶ ¶ 57, 65, 73.) However, the Court has previously determined CARR's fraudulent transfer claims to be general claims (see November 10, 2005 Order at 4), and CARR's statements concerning deferment of prosecution does not remedy its lack of standing.

The Court **DISMISSES** CARR's Fifth, Sixth and Seventh Claims for Fraudulent Transfer without leave to amend.

F. CARR's Eighth Claim for Declaratory Relief is derivative of infirm claims and is thereby, dismissed.

CARR has asked the Court to issue a “judicial determination of the rights and duties of CARR and [D]efendants” with respect to NVIDIA’s alleged successor liability and obligations under the Lease. (See TAC ¶ ¶ 75-77.) “[A] request for declaratory relief will not create a cause of action that otherwise does not exist.’ Rather, ‘an actual present controversy must be pleaded specifically’ and ‘the facts of the respective claims concerning the [underlying] subject must be given.” City of Cotati v. Cashman, 29 Cal. 4th 69, 80 (2002) (citations omitted). Accordingly, CARR’s claim for declaratory relief is wholly derivative of its foregoing claims.

The Court DISMISSES CARR’s Eighth Claim for Declaratory Relief without leave to amend.

G. CARR's Ninth Claim for Breach of Fiduciary Duty fails to state a claim.

CARR alleges that the 3DFX Defendants breached their fiduciary duties owed to CARR as a creditor by entering into the “secret agreement” with NVIDIA which concealed the fact that 3DFX would be going out of business and would eventually breach the Lease. (TAC ¶ ¶ 79-81.)

A corporation’s directors and officers owe no fiduciary duty to creditors under California law until the corporation becomes insolvent. In re Jacks, 243 B.R. 385, 390 (Bankr. Ct. C.D. Cal. 1999), aff’d in part,

rev'd in part, 266 B.R. 728 (9th Cir. B.A.P. 2001).⁴ "Because a director's fiduciary duties to creditors do not arise until the corporation is insolvent, the timing of the insolvency is critical." In re Jacks, 266 B.R. at 738. The time of insolvency as determined under California law is the point at which the corporation is unlikely to be able "to meet its liabilities . . . as they mature." *Id.* (quoting Cal. Corp. Code § 501).

Once a corporation becomes insolvent, the scope of a director's or officer's fiduciary duty to creditors is to

⁴ As the In re Jacks Bankruptcy Court noted: "[t]o a substantial extent, the right to recover from directors or officers of California corporations for the violation of their fiduciary duties has been codified in California statute." In re Jacks, 266 B.R. at 391. On appeal, the In re Jacks Bankruptcy Appellate Panel commented that although "California's Corporation Code provides a remedy for an insolvent corporation's director's violations of fiduciary duties to creditors . . . 'the common law is not repealed by implication or otherwise, if there is no repugnancy between it and the statute, and it does not appear that the legislature intended to cover the whole subject.' California's corporate statutes, while modifying remedies, do not eliminate the trust comprised of corporate assets that arises upon a corporation's insolvency." In re Jacks, 266 B.R. at 737 (internal citation omitted). Since CARR does not raise this claim in a statutory context, the Court does not consider its application, but rather, considers the common law application of CARR's claim to determine if there was a breach of a fiduciary duty for the purposes of this Order.

not "divert, dissipate or unduly risk assets necessary to satisfy their claims." In re Ben Franklin Retail Stores, Inc., 225 B.R. 646, 655 (Bankr. Ct. N.D. Ill.1998), amended and superseded by, 2000 WL 28266 (N.D. Ill. Jan. 12, 2000). California courts have applied the "trust fund doctrine" where "all of the assets of a corporation, immediately on its becoming insolvent, become a trust fund for the benefit of all of its creditors." In re Jacks, 266 B.R. at 736 (quoting Saracco Tank & Welding Co., Ltd. v. Platz, 65 Cal. App. 2d 306, 315 (1944) (internal citation omitted)). Under the trust fund doctrine, the directors and officers of the insolvent corporation become fiduciaries whose obligations to the creditors is to protect the assets of the insolvent corporation to satisfy their claims. See, e.g. Saracco, 65 Cal. App. 2d at 315.

Recovery for breaching this fiduciary duty generally pertains to cases where the directors or officers of an insolvent corporation have diverted assets of the corporation "for the benefit of insiders or preferred creditors." In re Ben Franklin, 225 B.R. at 655 (quoting from Laura Lin, Shift of Fiduciary Duty Upon Corporate Insolvency: Proper Scope of Directors' Duty of Creditors, 46 Vand. L. Rev. 1485, 1512 (1993)); see also Bank of America v. Musselman, 222 F. Supp. 2d 792 (E.D. Va. 2002); see also Helm Financial Corp. v. MNVA R.R., 212 F.3d 1076, 1081 (8th Cir. 2000).

Although the Court is unaware of any California cases that expressly limit the fiduciary duty under the trust fund doctrine to the prohibition of self-dealing or the preferential treatment of creditors, the scope of the trust fund doctrine in California is reasonably limited to cases where directors or officers have diverted,

dissipated, or unduly risked the insolvent corporation's assets. See In re Jacks, 266 B.R. at 736 (trust fund doctrine applied to a director's use of an insolvent corporation's assets to guarantee a personal debt); c.f. Commons v. Schine, 35 Cal. App. 3d 141, 145 (1973) (trust fund doctrine applied to a controlling partner's preference in paying insolvent partnership's debt to his own creditor corporation); see also Saracco, 65 Cal. App. 2d 306 (1944) (trust fund doctrine applied to a director's preferential distribution of assets); see also Wright Motor, 299 F. 106 (1924) (trust fund doctrine applied to a director's fraudulent transfer of corporate assets to himself); c.f. Title Ins. etc. Co. v. California Dev. Corp., 171 Cal. 173 (1915) (trust fund doctrine applied to a company controlling an insolvent development corporation's preferential payment of the insolvent development corporation's debts); see also Bonney v. Tilley, 109 Cal. 346 (1895) (trust fund doctrine applied to directors of an insolvent corporation, who were also creditors of the corporation, secured a preference to their claims over other creditors' claims). Given the application of the trust fund doctrine in California, the scope of the fiduciary duty to creditors can be broadly defined as not diverting, dissipating or unduly risking the corporate assets needed to satisfy creditors' claims.

As the court observed in In re Ben Franklin in defining the scope of a director's fiduciary duty to creditors under Delaware law, "the 'insolvency exception' to the general rule that directors owe no duty to creditors is, after all, an exception. Its scope should be no greater than the problem it was intended to solve." In re Ben Franklin, 225 B.R. at 655-56. A similar approach is taken by the Court in determining

whether the 3DFX Defendants could have breached a fiduciary duty owed to CARR as a creditor by entering into the "secret agreement".

The Third Amended Complaint alleges that a fiduciary relationship existed between CARR and the 3dfx Defendants because "when the [Agreement] was being negotiated and then executed, 3DFX was insolvent and/or in the zone of insolvency and the officers and directors thereby owed a fiduciary duty to CARR." (TAC ¶ 79.) CARR contends given that the Third Amended Complaint alleges that the "secret agreement" was created during the same month as the Agreement, which caused 3DFX's insolvency, a reasonable inference for the purposes of these motions can be made that the "secret agreement" occurred when 3DFX was insolvent and the 3DFX Defendants had a fiduciary duty to CARR.

Given that the 3DFX Defendants owed a fiduciary duty to CARR to protect the assets of 3DFX, the Third Amended Complaint must show that this duty was breached. The Third Amended Complaint alleges that this fiduciary duty was breached when the 3DFX Defendants entered into the "secret agreement" to hide the fact "that 3DFX would cease doing business on or about December 15, 2000, and would thereafter be in breach of the CARR Lease." (TAC ¶ 81.) However, this alleged breach of fiduciary duty is not related to protecting the assets of 3DFX in order to satisfy creditors' claims. Rather, the "secret agreement" is alleged to have breached a duty to disclose the source of 3DFX's rent payments and the fact that 3DFX was insolvent. Since the Third Amended Complaint does not allege that the "secret agreement" diverted,

dissipated or unduly risked the assets necessary to satisfy creditors' claims for which the 3DFX Defendants owed a fiduciary duty to protect, the Third Amended Complaint has not alleged that the 3DFX Defendants breached their fiduciary duty.

Furthermore, the nature of the "secret agreement" as alleged in the Third Amended Complaint reasonably suggests that the "secret agreement" may have actually helped protect the assets of 3DFX. The "secret agreement" is alleged to have provided a means by which 3DFX could continue paying its rent obligations to CARR at a time when 3DFX was allegedly unable to meet its liabilities as they became due. (TAC ¶ 81.) Even though the "secret agreement" is alleged to have also included the cessation of rent payments, the execution of the "secret agreement" as alleged in the Third Amended Complaint does not suggest that the rent payments that would otherwise go to CARR were diverted to a preferred creditor or used by the 3DFX Defendants in promoting their own self-interest.

The Court DISMISSES CARR's Ninth Claim for Breach of Fiduciary Duty with leave to amend.

H. CARR's Tenth Claim for Fraud is indistinguishable from the First Claim and is thereby dismissed on the same ground.

CARR's Tenth Claim for Fraud is a new claim asserted in the Third Amended Complaint. The fraud claim is primarily based upon a failure to disclose the "secret agreement." As discussed above, the injury from

the alleged "secret agreement" is indistinguishable from those allegedly inflicted upon the corporation through the implementation of the Asset Purchase Agreement and are consequently unparticularized as the CARR.

Without reaching the merits of the claim, the Court DISMISSES CARR's Tenth Claim for Fraud for lack of standing; the dismissal is with prejudice.

I. CARR's Eleventh Claim for Conspiracy is dismissed for lack of standing.

CARR alleges in its Third Amended Complaint that the Defendants conspired in creating the Agreement and the "secret agreement." (TAC ¶ 95.)

Under California law, "[n]o cause of action exists for conspiracy itself; the pleaded facts must show something which, without the conspiracy, would give rise to a cause of action." *Zumbrun v. Univ. of Southern California*, 25 Cal. App. 3d 1, 12 (1972). "Conspiracy is not a cause of action, but a legal doctrine that imposes liability on persons who, although not actually committing a tort themselves, share with the immediate tortfeasors a common plan or design in its perpetration." *Applied Equip. v. Litton Saudi Arabia Ltd.*, 7 Cal. 4th 503, 510-11 (1994) (citing *Wyatt v. Union Mortgage Co.*, 24 Cal.3d 773, 784 (1979)). Given that CARR has no standing to pursue the contractual interference claim against the NVIDIA Defendants, it has no standing to pursue the conspiracy claim.

The Court DISMISSES CARR's Eleventh Claim for Conspiracy without leave to amend.

J. CARR's Twelfth Claim for relief under a "Tort of Another" theory is dismissed.

Under the American rule, each party must generally pay his or her own attorney fees. Gray v. Don Miller & Associates, Inc., 35 Cal. 3d 498, 504 (1984). This rule is subject to several exceptions, one of which is the "tort of another," or "third party tort" exception, which allows recovery of attorney fees where the plaintiff is required to employ counsel to prosecute or defend an action against a third party because of the tort of the defendant. *Id.* at 505. CARR's alleged entitlement to recoupment of any attorney fees as damages arising from NVIDIA's allegedly tortious behavior toward 3DFX derives from its having standing to sue NVIDIA for the alleged tort. Lacking standing, CARR may not maintain this claim.

The Court DISMISSES CARR's Twelfth Claim for relief under a "Tort of Another" theory without leave to amend.

V. CONCLUSION

The Court GRANTS Defendants' Motions to Dismiss CARR's Third Amended Complaint.

With respect to the NVIDIA Defendants, the Court finds that there are no circumstances which would entitle CARR to proceed against NVIDIA for the alleged harm it inflicted on 3DFX and derivatively upon CARR. Therefore, the First, Fourth, Fifth, Sixth, Seventh, Eighth, Tenth, Eleventh, and Twelfth claims against NVIDIA are dismissed with prejudice.

With respect to the 3DFX Defendants, all claims are dismissed with prejudice except the Ninth Claim for Breach of Fiduciary Duty. Should CARR wish to file an amended complaint, it shall file within 30 days from the date of this Order.

Dated: September 29, 2006

JAMES WARE
United States
District Judge

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ORDER HAVE BEEN DELIVERED TO:**

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Dated: September 29, 2006 **Richard W. Wieking, Clerk**

By: /s/ JW Chambers
Elizabeth Garcia
Courtroom Deputy

11 U.S.C. § 541. Property of the estate

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

(2) All interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is--

(A) under the sole, equal, or joint management and control of the debtor; or

(B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable.

(3) Any interest in property that the trustee recovers under section 329(b), 363(n), 543, 550, 553, or 723 of this title.

(4) Any interest in property preserved for the benefit of or ordered transferred to the estate under section 510(c) or 551 of this title.

(5) Any interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the

petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date--

(A) by bequest, devise, or inheritance;

(B) as a result of a property settlement agreement with the debtor's spouse, or of an interlocutory or final divorce decree; or

(C) as a beneficiary of a life insurance policy or of a death benefit plan.

(6) Proceeds, product, offspring, rents, or profits of or from property of the estate, except such as are earnings from services performed by an individual debtor after the commencement of the case.

(7) Any interest in property that the estate acquires after the commencement of the case.

* * *

11 U.S.C. § 704. Duties of trustee

(a) The trustee shall--

(1) collect and reduce to money the property of the estate for which such trustee serves, and close such estate as expeditiously as is compatible with the best interests of parties in interest;

(2) be accountable for all property received;

(3) ensure that the debtor shall perform his intention as specified in section 521(2)(B) of this title;

(4) investigate the financial affairs of the debtor;

(5) if a purpose would be served, examine proofs of claims and object to the allowance of any claim that is improper;

(6) if advisable, oppose the discharge of the debtor;

(7) unless the court orders otherwise, furnish such information concerning the estate and the estate's administration as is requested by a party in interest;

(8) if the business of the debtor is authorized to be operated, file with the court, with the United States trustee, and with any governmental unit charged with responsibility for collection or determination of any tax arising out of such operation, periodic reports and summaries of the operation of such business, including a statement of receipts and disbursements, and such other information as the United States trustee or the court requires;

(9) make a final report and file a final account of the administration of the estate with the court and with the United States trustee;

(10) if with respect to the debtor there is a claim for a domestic support obligation, provide the applicable notice specified in subsection (c);

(11) if, at the time of the commencement of the case, the debtor (or any entity designated by the debtor) served as the administrator (as defined in section 3 of the Employee Retirement Income Security Act of 1974) of an employee benefit plan, continue to perform the obligations required of the administrator; and

(12) use all reasonable and best efforts to transfer patients from a health care business that is in the process of being closed to an appropriate health care business that--

(A) is in the vicinity of the health care business that is closing;

(B) provides the patient with services that are substantially similar to those provided by the health care business that is in the process of being closed; and

(C) maintains a reasonable quality of care.

* * *

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No. 08-1232

FILED

JUN 22 2009

OFFICE OF THE CLERK
SUPREME COURT U.S.

**In The
Supreme Court of the United States**

CARLYLE FORTTRAN TRUST,

Petitioner,

vs.

NVIDIA CORPORATION, et al.,

Respondents.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit**

**REPLY TO OPPOSITIONS TO
PETITION FOR WRIT OF CERTIORARI**

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I. REVIEW IS NECESSARY TO RESOLVE IRRECONCILABLE CONFLICTS REGARD- ING THE INTERPRETATION OF THIS COURT'S DECISION IN *CAPLIN*

A. The Conflict Is Irreconcilable, Not "Illusory"

The appellate decisions interpreting *Caplin v. Marine Midland Grace Trust Co. of New York*, 406 U.S. 416, 428 (1972), demonstrate the profound and irreconcilable conflicts among the circuits regarding a bankruptcy trustee's standing to pursue "general" creditor claims. While Respondents' surmise that these conflicts are "illusory," the circuits recognize that the conflicts are very real. *E.F. Hutton & Co. v. Hadley*, 901 F.2d 979, 987 (11th Cir. 1996) ("We recognize that there has been **divergence among the circuits** concerning the ability of a bankruptcy trustee to bring actions against third parties on behalf of creditors of the bankrupt."); *St. Paul Fire and Marine Ins. Co. v. PepsiCo, Inc.*, 884 F.2d 688, 696 (2d Cir. 1989) ("The courts that have considered this issue, however, have reached **differing conclusions.**"); *Koch Refining v. Farmers Union Cent. Exchg., Inc.*, 831 F.2d 1339, 1349 (7th Cir. 1987) ("Two recent appellate opinions (released since the writing of the above *Koch* opinion but prior to its publication) have decided this issue of a trustee's standing in **diametrically opposite ways.**"); *Jones v. Hyatt Legal Services (In re Dow)*, 132 B.R. 853, 862 (Bankr. S.D. Ohio 1991) ("There presently is a **split among the circuits** on the issue of a trustee's ability to

bring actions against third parties on behalf of creditors of the debtor"); *In re Miller*, 197 B.R. 810, 814 (W.D.N.C. 1996) ("These **two lines of cases** raise a question that was not asked, and therefore was not answered, in *Caplin*."); David Curry & Sajida Mahdi, *Newly Emerging Standard on Trustee's Standing to Assert Claims on Behalf of Creditors*, 120 BANKING L.J. 917, 918-19 (2003) ("Many courts continue to believe that *Caplin* remains good law and are generally unwilling to permit the trustee to assert the claim unless it involves a voidable transfer of property or debtor itself could have asserted it outside of bankruptcy. . . . Over time, however, an **emerging doctrine of standing** has seeped into the decisions of a number of courts **despite the absence of any statutory authority**."); Richard J. Corbi, *Causes of Action: What Is and Is Not Part of the Bankruptcy Estate?*, 17 NORTON J. BANKR. L. & PRAC. 4 (2008) ("There are **divergent views** as to how the courts answer this question.").

In *Caplin*, the debtor corporation executed an indenture with an indenture trustee pursuant to which the debtor issued debentures in the amount of \$8,607,600. To protect the debenture holders, the debtor covenanted to file certain certificates with the indenture trustee regarding debtor's obligation to maintain an asset to liability ratio of 2:1. "By requiring the company to maintain an asset-liability ratio of 2:1, the indenture sought to protect debenture purchasers by providing a cushion against any losses that the company might suffer in the ordinary course

of business.” 406 U.S. at 418. The debtor “sustained substantial financial losses in every year” from 1959 to 1965 without the debenture holders’ knowledge because the indenture trustee failed to fulfill its obligation to confirm the accuracy of the debtor’s certificates. *Id.* The debenture holders had a “general” claim against the indenture trustee since every debenture holder could make the claim. Yet, the Supreme Court held that the creditors (i.e., the debenture holders), not the reorganization trustee, had standing to pursue claims against the indenture trustee for failing to disclose the company’s losses. *Id.* at 434. *Accord* *Mixon v. Anderson (In re Ozark Rest. Equip. Co.)*, 816 F.2d 1222, 1223, 1228 (8th Cir. 1987) (creditors, rather than reorganization trustee, had standing to sue directors and officers of the debtor corporation as alter egos for “abuses of the corporation”).

In *Caplin*, however, the debenture holders were merely one class of creditors, not all creditors. Although the analysis should not differ on that basis alone, that one distinction has created a profound “divergence among the circuits,” which has not been addressed by the Supreme Court since *Caplin*. See *Mixon*, 816 F.2d at 1228 (“*Caplin* is still good law and is **the only Supreme Court case to address the standing question**”); Seymour Roberts, Jr., NORTON ANN. SURV. OF BANKR. LAW, Part I § I (2004) (“The concept of standing is omnipresent, as will be illustrated with respect to the standing of a trustee to bring causes of action on behalf of an estate, the

exception to a trustee's standing, the exception to the exception to a trustee's standing, and the exception to the exception to the exception to a trustee's standing. **This area of the law, to paraphrase a quote from Winston Churchill, is a riddle, wrapped in a mystery, inside an enigma."**).

After 37 years of confusion and turmoil among the circuits, it is time for the Supreme Court to open the enigma, unwrap the mystery, and unlock that riddle.

B. A "General" Injury To Creditors Is Not Necessarily An Injury To The Debtor

Respondents attempt to skirt the issue by arguing that the Ninth Circuit determined that Carlyle alleged "an injury to the bankrupt corporation itself" rather than an injury to creditors "generally," and that Courts of Appeal "universally agree" that a claim alleging injury to the bankrupt corporation belongs to the reorganization trustee rather than to the creditors. The embedded premise in Respondents' characterization is that if a claim can be asserted by all creditors, that claim must somehow belong to the debtor. From that embedded premise, Respondents argue that, therefore, only the trustee has standing to assert such general creditor claims. The injury at issue here, however, is an injury to the creditors, not to the debtor (3dfx). While 3dfx may have alleged an injury (inadequate consideration) arising out of its transaction with nVidia, the injury suffered by the

creditors is a different injury which arose out of that same transaction, but which had nothing to do with the adequacy of the consideration paid to 3dfx.

Carlyle's complaint alleged that nVidia and 3dfx conspired to divert 1,000,000 shares of nVidia stock to 3dfx's shareholders, officers and directors, at the expense of 3dfx's creditors. nVidia initially offered to pay \$100,000,000 cash for substantially all of 3dfx's assets. 3dfx rejected the offer and demanded that nVidia pay \$70,000,000 cash and 1,000,000 shares of nVidia stock (then worth over \$50,000,000). The 1,000,000 shares of nVidia stock, however, had to be reserved for 3dfx's insiders, and would be given to 3dfx for its shareholders, officers, and directors only if 3dfx were able to discharge over \$119,000,000 in liabilities owed to 3dfx's creditors with only the \$70,000,000 in cash. If successful, 3dfx would have received assets worth \$120,000,000 (\$70,000,000 cash plus \$50,000,000 in stock), rather than \$100,000,000. Even if 3dfx succeeded, however, the creditors of 3dfx were certain to lose \$30,000,000 (the difference between the \$100,000,000 and the \$70,000,000 available to the creditors). 3dfx failed, filed bankruptcy and its reorganization Trustee sued nVidia for fraudulent transfer and successor liability. If 3dfx had succeeded in discharging \$119,000,000 in liabilities with only \$70,000,000, however, 3dfx would have suffered no loss, as it would have recovered \$120,000,000 in assets, whereas the creditors still would have suffered a \$30,000,000 loss. The claims did not converge just because 3dfx failed.

To obfuscate this distinction, Respondents quote one passage of the Ninth Circuit opinion stating that Carlyle's complaint alleged an injury to 3dfx. However, in dismissing Carlyle's complaint for lack of standing under *Folks*, both the Ninth Circuit and the District Court also determined that Carlyle's complaint alleged injuries that are general to all creditors (even though only Carlyle was entitled to bring claims against nVidia for interference with or assumption of its lease). See Pet. App. 6 ("The district court did not err by relying on *In re Folks*, 211 B.R. 378 (B.A.P. 9th Cir. 1997), because it is consistent with *Smith* and our other decisions on trustee standing."); Pet. App. 27 ("the rule of *In re Folks* that the trustee has exclusive jurisdiction to assert claims where 'liability is to all creditors of the corporation' bars Carlyle"); nVidia Resp. App. 4 ("the law of the Ninth Circuit requires that this Court dismiss the general claims in the TAC for lack of standing"); nVidia Resp. App. 10 ("the rule of *In re Folks* that the trustee has exclusive jurisdiction to assert claims where 'liability is to all creditors of the corporation' bars Carlyle from asserting a claim for breach of fiduciary duty against the 3dfx Defendants").

C. The 3dfx Ds&Os Misrepresent The Record

The 3dfx Ds&Os claim that the split of authority among the circuits as to standing is irrelevant because "[n]either petitioner, nor any other creditor,

objected to the proposed settlement" between the Trustee and the 3dfx Ds&Os which purportedly released "any liability" of the 3dfx Ds&Os to Carlyle and other creditors.

The 3dfx Ds&Os misstate the record. In response to the 3dfx Ds&Os' motion to have their settlement agreement with the Trustee (which contained an overly broad release) approved by the Bankruptcy Court, on November 4, 2004, **Carlyle filed a written opposition** seeking clarification that "the Trustee is only releasing the Estate's claims, not individual claims of Carlyle, CarrAmerica or other creditors. . . ." (*In re 3dfx*, United States Bankruptcy Court for the Northern District of California Case No. 02-55795, Docket No. 487.) In response to Carlyle's opposition, the Bankruptcy Court stated on the record, which was incorporated by reference into the order approving the settlement, that:

THE COURT: . . . Lastly, there's the provision about the mutual releases and the language dealing with cause of action or claims that the trustee owns or has the power to release. . . . **[T]he trustee either owns the claim or he doesn't.** He either has the power to release or he doesn't. It's not a legal question. **It's not something that can be conveyed by contract.**

(Transcript of November 9, 2004 hearing; *see also* Petitioner's Ninth Circuit Excerpts of Record, Tab 25, p. 1564.)

On December 15, 2004, approximately one month after the Bankruptcy Court approved the settlement between the Trustee and the 3dfx Ds&Os, the Bankruptcy Court entered an Order granting Carlyle “immediate relief from the automatic stay to pursue the Carlyle D&O Claims . . . against the 3dfx Executives and recover thereon from such Policy. . . .” (Case No. 02-55795, Docket No. 520; *see also* Petitioner’s Ninth Circuit Excerpts of Record, Tab 15, p. 0740.) Obviously, in entering the order approving the settlement agreement between the 3dfx Ds&Os and the Trustee, the Bankruptcy Court did not release Carlyle’s claims. To the contrary, the Bankruptcy Court granted Carlyle relief from stay to pursue its claims against the 3dfx Ds&Os.

II. REVIEW IS NECESSARY TO RESOLVE INTER-CIRCUIT CONFLICTS REGARDING THE APPLICATION OF THE WAGONER RULE

Respondents claim there is no split in the circuits regarding the application of the *Wagoner* rule. Instead, they argue that “state law differences account entirely for the different results.” As shown below, Respondents are mistaken.

When the directors and officers of a corporation cooperate and conspire with a third party to defraud the creditors of the corporation, the corporation is *in pari delicto* with the third party. While the applicability of the *in pari delicto* doctrine may be a matter

of state law,¹ whether a trustee in bankruptcy has **standing** to pursue claims against a third party which is *in pari delicto* with the debtor is a matter of federal bankruptcy law. *Caplin*, 406 U.S. at 429-30 (“Assuming that petitioner’s allegations of misconduct on the part of the indenture trustee are true, petitioner has at most described a situation where Webb & Knapp and Marine were *in pari delicto*.”); *Shearson Lehman Hutton, Inc. v. Wagoner*, 944 F.2d 114, 118 (2d Cir. 1991) (“**Under the Bankruptcy Code** the **trustee** stands in the shoes of the bankrupt corporation and **has standing** to bring any suit that the bankrupt corporation could have instituted had it not petitioned for bankruptcy.”) (citing 11 U.S.C. §§ 541, 542 and *Caplin*, 406 U.S. at 429); *Bankruptcy Services, Inc. v. Ernst & Young (In re CBI Holding Co.)*, 529 F.3d 432, 454 (2d Cir. 2008) (“**Federal bankruptcy law** ‘places a trustee in the shoes of the bankrupt corporation and **affords the trustee standing** to assert any claims that the corporation could have instituted prior to filing its petition for bankruptcy.’”).

The Ninth Circuit acknowledged the inter-circuit conflict regarding the *Wagoner* rule in the opinion

¹ Regardless of any differences in state law relating to the application of the *in pari delicto* doctrine (and the Ninth Circuit below did not find any), such differences are irrelevant because Carlyle alleged that 3dfx and nVidia conspired to defraud the creditors of 3dfx and were therefore *in pari delicto*. Such allegations must be accepted as true for purposes of a Rule 12(b)(6) motion to dismiss.

below. Pet. App. 7. In declining to follow the Second Circuit, the Ninth Circuit relied on *In re Senior Cottages of America, LLC*, 482 F.3d 997, 1003-04 (8th Cir. 2007), which identified the Court of Appeal opinions that criticize and decline to follow *Wagoner*. Contrary to Respondents' suggestion, the Ninth Circuit did not rely on any purported differences between New York and California state law.²

Respondents cite *Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP*, 133 Cal. App. 4th 658, 677 (2005), to argue that California state law treats the *in pari delicto* doctrine as an affirmative defense rather than as an issue of standing. However, the California Court of Appeal in *Peregrine* was **interpreting federal bankruptcy law**, not California state law. *Id.* ("Although some cases have considered the bankrupt entity's unclean hands (generally referred to in **federal decisions** as the *in pari delicto* doctrine) as an element of standing (see, e.g., *Apostolou v. Fisher* (N.D.Ill. 1995) 188 B.R. 958, 972), they are analytically distinct concepts. (See *Official Com. of Unsecured Creditors v. R.F. Lafferty & Co., Inc.* (3d Cir. 2001) 267 F.3d 340, 346 (Lafferty)."). Moreover, in *Casey v. U.S. Bank National Ass'n*, the California Court of Appeal interpreted

² nVidia argues that "New York state law conflates the equitable defense of *in pari delicto* with questions of standing, and analyzes the questions together," but fails to cite any New York state law for this proposition.

Wagoner as a question of standing. 127 Cal. App. 4th 1138, 1143 (2005) ("denial of standing under *Wagoner* rule depends on 'whether the guilt of the corporate officers can be imputed to the corporation'").

Accordingly, it appears that not only the federal Courts of Appeals but also California state appellate courts are split on how they interpret the *Wagoner* rule.³

³ Unless the *Wagoner* rule is followed, innocent creditors may lack standing to sue third parties for "defrauding a corporation with the cooperation of management," 944 F.2d at 118, and reorganization trustees may be barred from asserting such claims because the *in pari delicto* doctrine provides a complete defense, thereby precluding any recovery by the creditors or the reorganization trustee against guilty parties who conspire with them. This was precisely the problem that concerned the Supreme Court in *Caplin*. 406 U.S. at 429-30. Given the historic rise in the number of high-profile bankruptcy cases involving Ponzi schemes, it has become especially important for the Supreme Court to address the split of authority regarding the *Wagoner* rule. *Study: Securities litigation on the rise*, DAYTON BUS. J., Apr. 15, 2009 ("The study shows that the Securities and Exchange Commission and U.S. Department of Justice had an unprecedented number of Ponzi schemes on their radar last year."); Ed Duggan, *Madoff fallout promises to spark litigation*, TAMPA BAY BUS. J., Dec. 16, 2008 ("There are defenses to the clawback, including one that may become very familiar to the legal community before the Madoff litigation is over: *in pari delicto*, or the doctrine of equal fault.").

III. WHETHER A REORGANIZATION TRUSTEE HAS STANDING TO PURSUE A LANDLORD-CREDITOR'S DAMAGES IN EXCESS OF THE "CAP" IS AN ISSUE OF FIRST IMPRESSION

Respondents admit that whether or not a reorganization trustee or the landlord-creditor would have standing to pursue lease damages in excess of the "cap" imposed by 11 U.S.C. § 502(b)(6) is an issue of first impression before the federal courts, but argue that it is "not the sort of earth-shattering issue" which justifies granting certiorari. Determining whether the "cap" bars a landlord-creditor's claims against a solvent, multi-billion dollar third party like nVidia will have far-reaching effects in this unprecedented downturn in the commercial real estate and leasing market (*e.g.*, the recent bankruptcy filing of General Growth Properties Inc. – the largest real estate restructuring and real estate Chapter 11 case in the history of this country).

IV. REVIEW IS NECESSARY TO DETERMINE WHETHER THE NINTH CIRCUIT COMMITTED PLAIN ERROR IN FINDING THAT E-MAILS CANNOT SATISFY THE STATUTE OF FRAUDS

Respondents claim that whether or not the Ninth Circuit erred in finding that E-mails cannot satisfy the statute of frauds is a state law question which is "the antithesis of a cert.-worthy issue." While the United States Supreme Court ordinarily defers to

lower courts' interpretation of state statutes, the Supreme Court is "particularly reluctant to defer when the lower courts have fallen into plain error. . . ." *Frisby v. Schultz*, 487 U.S. 474, 483 (1988). Given that the courts below dismissed Carlyle's complaint with prejudice as a matter of pleading under Rule 12(b)(6) of the Federal Rules of Civil Procedure based on the defense of the statute of frauds **without an opportunity to amend**,⁴ this appeal involves not only a matter of "plain error" but also a matter of fundamental due process.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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⁴ The statute of frauds became an issue only with respect to Carlyle's Fourth Amended Complaint and was never an issue with respect to Carlyle's Third Amended Complaint. nVidia Resp. App. 1-14.